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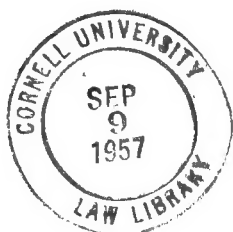
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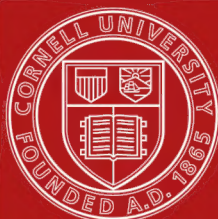
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8 VO. SHEEP.

By **FRANCIS B. DIXON,** Author of *Abridgment of the Maritime Law.*

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4. OF THE AUTHORITY OF THE MATE.
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- 11 OF STOPPAGE IN TRANSITU.
- 12 OF PILOTS.
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- 15 OF THE PERILS OF THE SEA.
- 16 OF THE MEDICINE CHEST.
- 17 OF THE SUPPLIES REQUIRED BY STATUTE TO BE PUT ON BOARD.
- 18 OF THE EARNING AND PAYMENT OF WAGES, when the whole wages are to be paid ; cases in which a part only is paid ; service not wholly performed by reason of Death, Shipwreck or Abandonment of the Voyage ; and time at which payment is to be made.
- 19 OF THE REMEDY OF SEAMEN TO OBTAIN PAYMENT OF WAGES-

20 OF CONSULS, their general duties, and particularly with regard to destitute Seamen.

21 OF BILLS OF EXCHANGE.

22 OF THE REVENUE LAWS.

23 OF GENERAL AVERAGE.

24 OF THE ADJUSTMENT OF GENERAL AVERAGE.

25 OF PARTICULAR AVERAGE AND PARTIAL LOSS.

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APPENDIX, containing a Vocabulary of Sea Terms ; Rules for *Stowage and Dunnage*, and many very useful and legally approved forms.

HAND BOOK

OF

MARINE INSURANCE AND AVERAGE.

BY FRANCIS B. DIXON, Counsellor at Law, Author of "An Abridgment of the Maritime Law," also, of "The Law of Shipping, and Merchants' and Ship Masters' Guide."

CONTENTS:

CHAP. I. The Master.	X. Of Implied Warranties.
II. On Marine Insurance.	XI. Of General Average.
III. Of the Policy of Insurance.	XII. Adjustment of General Average and Contribution.
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NAUTICAL ROUTINE

AND

STOWAGE,

WITH

SHORT RULES IN NAVIGATION.

BY JOHN MCLEOD MURPHY AND W. N. JEFFERS, Jr.

A PRACTICAL TREATISE

ON THE

ADJUSTMENT

OF

GENERAL AVERAGE

IN THE UNITED STATES AND OTHER COUNTRIES,

INCLUDING THE ELEMENTS OF MARITIME AND INSURANCE LAW,
ALSO, THE RIGHTS AND LIABILITIES OF UNDERWRITERS
AND SHIP-OWNERS, AND THE GENERAL
DUTIES OF SHIP-MASTERS.

BY FRANCIS B. DIXON,
COUNSELLOR AT LAW AND AVERAGE ADJUSTER.
AUTHOR OF "THE LAW OF SHIPPING;" "HAND-BOOK OF MARINE INSURANCE
AND AVERAGE," ETC.

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P R E F A C E .

There is no branch of law in which a treatise, uniting theory with practice, appears to be so much wanted, as in that which relates to the rights and liabilities of the insurer and insured, and the adjustment of claims arising out of them.

The author has, in his previous works, endeavored, to some extent, to supply this want, but to avoid their being voluminous and costly, he was compelled to give only a synopsis or digest of the various rules and principles which govern the practice of insurance and maritime law in the *United States*.

Reflection and experience have, however, convinced him that the merchant requires not only a competent knowledge of the law of *his own country*, but also of those of *other nations*, on subjects to which he may occasionally be obliged to conform.

So much indeed, is the loss occasioned to the mercantile community and to the country at large, by the uncertainty as to the rules of law which, in other countries, govern the system of General Average, felt, that an effort has recently been made to establish some uniformity of system, and, if practicable, to reduce the customs and rules of the different maritime nations to some degree of harmony. Delegates were appointed by the Chamber of Commerce and Board of Underwriters of New York, by the Board of Trade and the Board of Underwriters of Boston, and by similar associations in other parts of the United States, to attend a Congress to be held in Glasgow.

The Conference was held in September, 1860, under the presidency of Lord Brougham and Lord Neaves, and delegates from all parts of the world were present.

The result of the deliberations and discussions of this convocation, embracing the most intelligent and learned men of Europe and the United States, was the adoption of sundry resolutions, covering some

disputed points, and providing for the drawing up a bill, with a view to its being enacted into a law by the legislative authorities of the several nations of the world. The draft of a bill was made and submitted to the National Association held in York, in September, 1864, and, after being thoroughly discussed, was rejected, and in its place certain "International General Average Rules" were adopted, and recommended as the basis of "International General Average law," to be established either by legislation. or by clauses inserted in Bills of Lading and Charter Parties.

Nothing further has been done, and it is feared the task will be found impracticable. The principles regulating claims in General Average, have, in this country, been settled by a long series of judicial decisions, to say nothing of usages having all the force of law. And most of the continental nations of Europe, have undertaken to regulate the matter by ordinances or codes, many of which are of great antiquity; the construction of these ancient rules has been fixed by much jurisprudence; they have been the subject of elaborate commentaries, and the practice of the respective ports and places where they exist has so long accorded with them, that nothing short of legislative action can practically supersede their force.

Even in France, the leading principles of the Commercial Code, established by Napoleon the First, are the same as those of Louis the Fourteenth, on the subject of Average; and considering that any essential change in respect to this branch of the law, involves a modification of a code which has served as a text for the learned commentaries of Valin, Emerigon, Boulay, Paty, Pardessus and others, I doubt whether it will be practicable to prevail upon that government to introduce any practices which militate with their code.

Until the days of Lord Mansfield, the laws and usages of England did not vary essentially from those of the rest of the commercial world; the system prevailing in that country, at the time of our Revolution, was adopted by us as a part of the common law, and has governed our practice ever since. Great Britain has introduced innovations, some of them under the sanction of courts of law, but more of them as "Customs of Lloyd's," and I apprehend it will be found very difficult to convince Lloyd's Underwriters that those customs, long established by them, ought to be essentially modified,

Thus we see the difficulties, apparently existing, against the establishment of an universal system. It is possible it may be ultimately accomplished, and I sincerely hope so ; but, without wishing to discourage the promoters of the scheme, who deserve the warmest thanks of the maritime community for their arduous efforts, I fear the prospec' does not appear very encouraging at present.

Until some measure of this kind is established, it is highly desirable that merchants and underwriters should be provided with the means of readily obtaining a knowledge of the principles of adjustment which prevail in other countries besides their own, so that they can calculate with some degree of certainty, what will be the indemnity sought and obtained, in the event of their vessel arriving at her port of destination, so damaged by sea perils and sacrifices as to render an adjustment at that place necessary. It is well known, that a ship is frequently owned in one country, insured in another, and bound to a port which has different rules from either of the others.

Encouraged by the reception my previous works have received, I have felt it a duty to make an effort to supply this *desideratum*.

Though I have had access to many foreign adjustments and codes, I have been greatly assisted in my labors by the valuable works which have been published on the subject of insurance, and I am especially indebted to the valuable report of the Hon. William Marvin, one of the delegates to the International Convention.

For the reasons I have stated, the primary object of the present work has been to illustrate the practice of General Average in the United States and other countries. But no work on the subject of General Average, could leave out the law of Shipping and Insurances as they are so closely connected that they need the mutual illustration they can render each other. I have, therefore, extended the work so as to embrace those topics ; and also endeavored to point out the ship-master's duties in matters growing out of disaster. This has unavoidably increased the size of the work beyond the limit originally intended. The desire to make the law, which regulates the contract, of merchants, well understood, has been my governing ambition—feeling satisfied that I could be engaged in no enterprise that would do more to promote the true interests of commerce. Maritime contracts are the business of every hour, and as merchants cannot

resort on all occasions to professional advice they ought themselves to possess sufficient knowledge to enable them to transact their ordinary business without such aid. A man who purchases an estate may act with caution ; but mercantile transactions seldom admit of much deliberation. A merchant, in many cases, must decide at once, and act upon his own judgment ; and a work that will enable him to do so with safety, in a very important branch of his business, and so as sometimes to obviate disputes, cannot fail of being beneficial to him.

I trust this work will also be found useful to members of my own profession, as a book of reference ; every question discussed has been viewed by the light of judicial decision, and the cases cited or referred to.

FRANCIS B. DIXON.

Boston, Mass., September, 1867.

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CHAPTER I.

GENERAL AVERAGE.

GENERAL PRINCIPLES.

Common Interest.

UNITED STATES.—General Average is a contribution by all parties concerned, towards a loss sustained by some of the parties in interest for the common benefit. It is founded upon the idea of copartnership against the extraordinary perils of navigation. Whenever an extraordinary peril is impending over the whole adventure, and the master, who is the common agent of all concerned, acting in good faith and with common discretion, selects a particular part of the property at risk and destroys it, or exposes it to some special injury or risk, with a view thereby to avert or mitigate the common danger, the owner of that part is entitled to satisfaction for his loss by an average contribution.

But press of sail put on a vessel to enable her to wea-

ther a lee shore, when it is known that the exposure will entail loss, although voluntarily done for the general good, does not constitute General Average. Neither does the sacrifice of sails cut up and destroyed to fit the places of other sails previously lost, for they have been applied only to the purposes originally intended, when put on board, *i. e.* the safe navigation of the ship. The same rule applies to all other materials, but when sacrificed or used for other purposes it constitutes good claim for Average Contribution.

ENGLAND.—A loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, for the joint benefit of ship and cargo.

The plainest principles of equity require that the sacrifices so submitted to, should be made good, and the expenses incurred repaid, by a general contribution from all those benefitted by either the one or the other, in proportion to the value of the property, which those sacrifices and expenses have been instrumental in saving. Hence, a General Average Contribution may be defined to be a contribution by all parties in a sea-adventure, to make good the loss which has been sustained by one or more of their co-adventurers, from sacrifices made or expenses incurred for the general benefit. *Arnould.*

A contribution according to value made by the associated interests which form a marine adventure. These are, the ship itself, the merchandise she carries, and the freight she earns. The persons to whom these several interests belong are sometimes called the co-adventurers. The object of this contribution is the repayment of some expense incurred, or the restitution of something

valuable sacrificed, for the benefit of the whole. *Hopkins.*

There must be a "common interest" between all property affected by a General Average. *Baily.*

FRANCE.—In general, comprises damages and expenses voluntarily incurred for the common welfare and safety of ship and cargo, from the loading and departure to the return and discharge of the same.

Rogron. 400.

GERMANY.—All damage done to ship or cargo, or both, by the master or by his orders, with intent to save both from a common danger, as also the consequent damage resulting therefrom, and the expenses incurred for the same purpose, are General Average. *German General Mercantile Law.*

Voluntary and deliberate act.

UNITED STATES.—A loss, though it be extraordinary and not a part of the expense and inconvenience of navigating the vessel, if it take place without the agency of the master, crew or other persons acting for the general benefit, is not a subject of general contribution.

ENGLAND.—The leading characteristic of a General Average loss is, that it is the intentional act of man, not the inevitable result of the peril insured against. *Arnould.* 882.

The sacrifice must be made deliberately, voluntarily, and with the object of saving or protecting the remainder of the property at risk. *Hopkins.* 26.

FRANCE. The act must be voluntary and deliberate; notwithstanding in some cases of an immediate danger, the General Average is accepted, though the loss or sacrifice be made without deliberation. *Practice of Bordeaux.*

Amount of danger requisite to justify a General Average act.

UNITED STATES.—In order to constitute a case of General Average, a common danger must occur; a danger in which ship, cargo and crew all participate; a danger imminent and apparently inevitable, except by voluntarily incurring the loss of a portion of the whole to save the remainder. *Barnard v Adams*. 10 Howard's (U. S. Supreme Ct. Reps.) 270. 303.

ENGLAND.—There must be a moral certainty of total loss when the act is performed. *Baily*.

The sacrifice must be made under the urgent pressure of some real and immediately impending danger, and must be resorted to as the sole means of escaping destruction. *Arnould*.

FRANCE.—The same as England.

Whether a successful result be necessary.

UNITED STATES.—The attempt to avoid the imminent common peril must be successful. *Barnard v Adams*. 10 Howard, 270.

If it do not save other property or interests, there is in

the first place, no sacrifice, as it may be presumed that the property jettisoned would have been lost with the rest; and in the next place, if no one be benefitted by the sacrifice, no one can be called on to contribute a portion of what was saved for him, in order to make the loss equal. 1 *Parsons*, 288, 318. 2d *Phillips*, 99.

To constitute a claim for General Average, it must appear that the sacrifice was necessary and voluntary; it must be intended for the safety of all concerned, and it must appear that thereby the property which is to contribute, was rescued from the imminent peril then impending.

In *Scudder v Bradford*, 14 Pickering, 13, the master of a vessel which was dragging her anchors towards the shore, cut away the masts to prevent her drifting, and thereupon she brought up, but after an hour she drifted again, and was wrecked. The cargo, which was saved, was held not liable in General Average, inasmuch as the sacrifice of the masts did not rescue it from the particular peril then impending. See also, *Williams v Suffolk Ins. Co.* 3 Sumner, 510.

Witteridge v Norris, 6 Mass., 125; *Nickerson v Tyson*, 8 Mass., 467; *Maggrath v Church*, 1 Caines, 196; *Sansin v Ball*, 4 Dallas, 459; *Sims v Gurney*, 4 Binney, 524. There is no contribution, if, at the time of sacrificing the cargo, there were no possibility of saving it. *Crockett v Dodge*, 12 Maine, 190.

ENGLAND.—Where the ship perishes by the peril which the sacrifice was intended to avert, the goods saved should, it seems, contribute for those sacrificed, only in case the whole or greater part of the cargo be preserved.

But if immediate safety be procured by the sacrifice, and the ship afterwards perish by another peril, the goods saved from the wreck, however damaged, must contribute for those sacrificed, at the value or price they would have produced in a damaged condition as compared with those saved. *Arnould*, 924.

An act may be a General Average act when it did not and really could not have a beneficial effect. *Baily*.

Whether it be necessary to consult with the crew previous to the commission of an act of General Average.

UNITED STATES.—A consultation between the master, officers and crew, though in some cases proper to precede a voluntary sacrifice, is not essential to make a case of General Average. *Columbian Ins. Co. v Ashby*, 13 Curtis, Sup. Ct. Reps. 176.

ENGLAND.—By the law of England, the master is not bound to consult with his officers or crew previously to the sacrifice, although this course, when practicable, is often prudent. *Maude v Pollock*, p. 192. *Hopkins*, 8.

FRANCE.—Captain to consult officers, and owners of cargo, if on board ; in case of difference of opinion, that of officers to prevail. *Rogron*, 410 ; *Code de Commerce* livre 2, tit. 12, art. 410.

JETTISON AND ITS CONSEQUENCES.

Jettison, and expenses incurred to float a stranded ship.

UNITED STATES.—Damage to vessel or cargo, caused by accidental stranding, is Particular Average. But the expenses incurred in refloating a stranded ship with the cargo on board, or by landing the cargo, using steam-tugs or resorting to other measures begun and carried on continuously by the master as one enterprise, with a view as well to the preservation of the cargo as to the refloating of the ship and the prosecution of the voyage, and the ship is refloated, and she resumes her cargo or prosecutes the voyage, are, *universally*, considered to be General Average, including the expenses incurred subsequently to the landing of the cargo, as well as those antecedently incurred, and including also the damage caused to the ship or cargo by the means employed to refloat the vessel; and these expenses are, in such cases, General Average, without regard to the question, whether the vessel be voluntarily or accidentally stranded.

But if, after the cargo is landed and put in a place of safety, the vessel do not float, and a new and distinct enterprise be entered upon and carried on by the master for the purpose of refloating the ship, the expenses of such *new* enterprise were not, until the recent decision of the *United States Supreme Court*, in the case of ship "*Rachel*," *McAndrews v. Thatcher*, decided in December Term, 1865, regarded as General Average. In this

case Mr. Justice *Clifford* held that the expense of such new enterprise, carried on by the master with a view to the further prosecution of the voyage, would be General Average, provided the cargo, though landed in safety, remain under the control of the master, and be liable to be taken on board again by him for the purpose of prosecuting the voyage. But if, the cargo being landed and in safety, the master abandon the enterprise of re-floating the ship, or if the cargo or all but mere remnants of it be conveyed in lighters to its port of destination, and so is not to be taken on board again for the purpose of prosecuting the voyage, the community of interest is dissolved by the abandonment of the enterprise in the one case, or by the landing of the cargo in the other, at the port of destination, and the expenses subsequently incurred are not General Average. The community of interest is supposed to remain until the voyage is abandoned or the cargo landed in its port of destination, or until in some other way there is a complete separation of the cargo from the ship, not again to be reunited; and whatever is done for the protection of the common interest should be done at the common expense. If, however, part of the cargo be transhipped by the master to the port of destination, in the process of lightering the ship with a view to the refloating of the vessel, and the vessel be refloated by one continuous series of operations, carried on by the master, and she finish her voyage with the rest of the cargo on board, the part so transhipped will be liable to contribute to the general expenses of refloating the vessel, as well those incurred subsequently to such transhipment as

those antecedently incurred.

ENGLAND.—Mr. *Hopkins* thus states the English rule:—"There are some charges incurred after a ship is stranded, or is in such a situation as to render it certain that she will never complete the voyage she is on, and so is to all purposes a wreck, which still partake of the nature of General Average, although, generally speaking, the wrecking or stranding of a vessel breaks up the adventure and so dissociates the interests, yet the expenses alluded to do not apply separately to the several interests, but are to be divided over them, *ad valorem*. Thus salvage services; attempts, though ineffectual, to get the ship off; watching; the general attendance of Lloyd's Agent and other agents; documentation and other expenses intended for the whole property, without exception, are to be thus divided. It is not that there is any longer a bond of union among the several interests—for this is now destroyed—but because this is the best manner of applying the charges to the various interests. And there are charges which do not seem to apply, at first sight, to more than one of the interests, perhaps, which on further thought will be found to have an applicability to the whole of them collectively. The discharge of cargo from a wreck lying on the rocks may seem to be a step taken with reference to the individual benefit and safety of the cargo only; and one towards which the ship could not be called upon to contribute. But if it be impossible to get the wreck away from the rocks whilst encumbered by the cargo remaining in her, or if the weight of the cargo render it probable that she will be broken in pieces

where she lies, it is plain that the ship does really participate in the benefit of measures which were primarily undertaken for the salvage of the cargo.

So again, the cutting away a ship's masts when she is a hopeless wreck, may be very advantageous to the cargo, in preventing the rolling of the vessel on the rocks, which would hasten her utter destruction and the loss of everything on board." *Hopkins*, 48.

In the UNITED STATES the sacrifice of ship's masts and materials constitutes a claim for General Average, at the estimated value the material would have produced at the scene of wreck as compared with other materials there sold. It must, however, be clearly shown that the loss arose from the sacrifice and that there was every probability of saving the sacrificed parts with the other materials.

FRANCE.—The expenses incurred for the common benefit in refloating a loaded stranded ship, whether stranded fortuitously or voluntarily, including damage to the ship, rigging, boats, or the damage to, or loss of, goods, occasioned by the efforts made to refloat the ship, are General Average. If the measures taken to refloat the ship fail, and the ship be lost, all the Averages will be Particular, and the expenses of saving will be arranged in two classes—the one Particular to the ship, the other to the cargo, accordingly as they have in the end been respectively benefitted. If the stranding be voluntary, then all the damage to ship or cargo is General Average, provided, always, that the ship be refloated with the cargo on board, or the ship resume the cargo and proceed on the voyage or to a port of refuge. *Traite*

sur les Assurances Maritimes, by M. Cauvet.

GERMANY.—If the ship be stranded without the stranding being purposely done for the preservation of ship and cargo, then the damages caused by such stranding are not General Average, but the expenses occasioned by the getting off, and the damages purposely inflicted on ship and cargo with this object, are General Average.

SWEDEN.—If the vessel through disaster, get aground, then no other damage shall be compensated for by General Average than the cost of getting the vessel afloat, or bringing it and the goods into safety. *Swedish Maritime Code of 1865.*

Jettison to prevent a vessel's foundering.

Universally General Average.

Jettison to enable a vessel to escape an enemy.

UNITED STATES.—If a cable be cut, and an anchor lost, or goods jettisoned to escape from an enemy, this is as certainly an Average loss as if done to escape wreck. 1 *Parsons*, 306, *Stevens & Benecke*, Phillips Ed., 154.

ENGLAND.—General Average.

FRANCE.—General Average. *Emerigon*, in his treatise on Insurance, ch. XII., s xli., § 5 Meredith's Ed. 480, gives a very good illustration of this. The Master of a French vessel, having been pursued by two frigates,

and his flight being intercepted by two others ahead, as soon as it was dark, lowered his boat into the sea, with a mast and sail, and a lantern at the mast-head, and then changed his course, and sailed all night without a light, and in this way escaped. The value of the boat was made good by a General Average contribution.

Jettison of goods which endanger the vessel and the property in her, (cargo heated &c).

Not General Average in the *United States*, nor, we believe, in *any country*.

Jettison rendered necessary from the ship's being too heavily laden to encounter the ordinary perils of the sea.

UNITED STATES.—The loss, in this case, arises from the wrongful act of the master, and does not constitute a case of General Average.

Where the unseaworthiness of the vessel, at the time of sailing on the voyage caused, or contributed to produce the necessity for, the jettison.

The loss is not within the exception of the perils of the seas, and the vessel is liable for the whole value of the goods thrown overboard. 19 *Howard*, 162, 166 ;

17 *Howard*, 100, 110 ; 13 *Maine*, 357.

Whether the property in peril and rescued, must be saved by the sacrifice.

It is perfectly clear, as we have previously stated, that property which is *not saved*, but wholly lost, is in no way benefitted by the sacrifice, and, therefore, in no way under the implied obligation of compensating for it. But the question, if there be a sacrifice for other property, and that other property *be saved*, must it also appear that it was *saved by the sacrifice*, or, in other words, would have been lost without it, in order to entitle the owner of the property sacrificed, to Contribution, is more difficult of solution.

When judges, or text-writers, say that the impending peril for which a sacrifice was made, must be averted by the sacrifice in order to found a claim for Contribution we think they go too far. The rule should certainly be regarded with some qualifications.

In *Scudder v. Bradford*, 14 Pickering's Reps. 13. A vessel was dragging her anchors and drifting towards the shore. Her masts were cut away, and she was thereby brought up. An hour afterwards she went on shore. It was held that the masts were not to be contributed for because the property was not rescued from the peril by their destruction.

Pardessus presents as a rule of the *French* law, this proposition :—"That if once the damage for which the sacrifice had been made be avoided—for example, that

the tempest be ended, or the ship have escaped from the enemy, even *if it be for a slight interval*,—contribution is due. *Art. 743.*

Pothier is of opinion, that, if a part of the property be sacrificed for the common benefit, whatever is eventually saved must contribute for the loss, whether the impending danger be avoided or not. *Ins. n. 128, 414.*

In *Lee v. Grinnell*, 5 Duer, 400, 411. It was held :—“There must be the intent to sacrifice the thing designated. The sacrifice must be accomplished. Some definite advantage must have sprung from it. A final preservation must ensue, not indeed by a logical necessity directly and solely from the sacrifice, but as reasonably contributed to by it, or as consistent with it, as with any hypothesis the circumstances will allow,” and Mr. Justice *Hoffman* further says :—“I consider the true rule to be, that the achievement of the object designed, for even a very short period of time, will be sufficient to justify Contribution, notwithstanding a subsequent loss, provided the ultimate loss result from a new peril.”

In *Barnard v. Adams*, 10 Howard, 373. It was held by Mr. Justice *Grier*, that the attempt to avoid the imminent common peril must be successful.”

The doctrine which seems to predominate in the more recent jurisprudence, is, that the impending danger must be averted, in whole or in part, by the sacrifice.

If this be regarded as the established rule, we cannot see that it is founded in equity or policy.

In *Stevens & Benecke*, (by Phillips), pp. 100, 105,

107, it is strongly contended that this rule is contrary to the principles and policy of General Average, on the ground that no one has the right to attempt the preservation of the whole at the risk of an individual, and this reasoning seems to us conclusive.

The rule, that whenever an extraordinary peril is impending over the whole adventure, and the master who is the common agent of all concerned, acting in good faith and with common discretion, selects a particular part of the property at risk and destroys it, or exposes it to some special injury or risk, with a view thereby to avert or mitigate the common danger, the owner is entitled to be compensated by an Average Contribution, is founded in the highest equity, and good policy enjoins its liberal administration in favor of the party whose property is voluntarily sacrificed.

In case of jettison to relieve a ship laboring under stress of weather, or to enable her to escape from a pursuing enemy, the claim for Contribution could not be defeated by proof that the storm had suddenly ceased or that the enemy's ship then far behind, was destroyed by an accidental explosion, at the instant of jettison. It would seem to be enough that a real danger exists, that it appears to threaten the whole adventure, and that the mind of the agent acts upon the question, judges the sacrifice to be conducive to the general interest, and makes it accordingly.

Contribution, as we have said, is due from the owner of the ship or cargo only upon its coming to its use, consequently it is quite true to say, the common concern, or more properly speaking, some part of it must be sav-

ed, but this pre-requisite to a case of Average Contribution has no special reference to the saving the concern from the calamity which was impending at the time of the sacrifice.

The rule of Contribution, generally adopted by experienced adjusters in the settlement of General Average cases in the *United States*, appears to be, that compensation is due to the owner in General Average whenever an injury of any kind results to part of the property engaged in a maritime adventure from an act out of the ordinary course of navigation, intentionally done in contemplation of injury to a part, but with intent thereby to preserve as much as possible from the evil consequences of an extraordinary peril existing at the time, and apparently threatening damage to the whole adventure.

It is necessary that the sacrifice be made by one having authority to act as agent for all concerned, as for instance the master or some one rightfully acting in his stead; it is necessary that the thing thus devoted to the common service be injured by the act of devoting it, but it is not necessary that such act should impair its prospects of safety from the impending calamity; it is enough that its prospects of safety be altered by an act not necessary to the navigation of the ship under ordinary circumstances.

It is necessary that something be ultimately saved from the adventure or voyage, and come to the hands or use of the owner, but so far from its being necessary that the saving should be effected by means of the sacrifice, or that the peril in view should be thereby, or at all

events, averted, it does not appear to be even necessary to show that the supposed peril existed in point of fact. However manifest it may be in the event, that the sacrifice was necessary, and that independently of the sacrifice, the apprehended evil could not have occurred, the party should be entitled to compensation, if, in the exercise of a sound reasonable discretion, the master voluntarily subject his property to injury for the purpose of averting or diminishing an extraordinary peril which appeared to threaten the safety of the whole adventure.

The law of Average Contribution leaves each party to bear the loss which results from ordinary navigation, or the direct action of extraordinary perils, but makes all concerned co-operators to the extent of their several interests, in the common fund in respect to losses arising from the voluntary devotion of any part by the common agent of the parties, to an unusual service, for the benefit of the whole, in averting or beneficially modifying, what, to such agent, in the exercise of a sound reasonable discretion, appears to be a common danger.

There really seems to be no substantial basis for the doctrine, that, in order to found a claim for Contribution, the evil must be averted at all. The sacrifice gives a claim for Contribution, not strictly against the owner, but against the property intended to be benefitted, and if that property survive the adventure, and come to the use of the owner, in whole or in part, whatever its condition, whether sound or partially damaged by the shipwreck vainly sought to be avoided, or by any other means, it should contribute.

Jettison of Deck Cargo.

The general rule of the maritime law in all commercial countries is, that goods carried on the deck of the vessel and thrown overboard for the common safety, are not entitled to be contributed for in General Average, though they contribute to the jettison of other goods.—The exception to the rule in *England* and the *United States* is, that when the goods carried on deck, are carried there in conformity with a custom of the trade in which the vessel is engaged, and are stowed in the customary way, they are to be contributed for.

In the *United States*, propellers navigating the lakes, the Hudson river, Long Island Sound, &c. carry much of their cargoes on deck. The steamers plying between the lake ports, between New York and Albany, New York and the Eastern ports, &c., transport their freight on deck. On the Ohio and Mississippi rivers, the practice is well known; cattle, swine, sheep, &c., are carried in the internal and coastwise trade on deck, and general shippers load their goods on such vessels with full knowledge of such custom.

In the recent case of *Harris and others v Moody & Telfair*, (Court of Appeals, State of New York, March, 1864) 3 N. Y. Reps. 266, it was held that goods carried on deck according to the custom of the trade, by steamboats navigating Long Island Sound, and stowed in the usual way, are liable to Contribution by way of General Average for loss occasioned by a jettison of other goods necessarily thrown overboard under stress of weather and while subjected to the perils of the sea. *Hogeboom J.*

held, "The general rule undoubtedly is, that goods shipped on deck contribute, if saved, but if lost by the jettison, are not entitled to the benefit of General Average. But the rule has its qualifications.—1st, It is strictly applicable only to those vessels which are expected to encounter the extraordinary perils of the sea, and not to those which navigate smoother waters, and are comparatively safe from extraordinary exposure. 2nd, The custom and usage prevailing on the particular route navigated, as to the place on the vessel where the cargo is stowed or located, has a material bearing upon the right of the jettisoned cargo to Contribution for loss. If by such usage the cargo be stowed on the main deck, and not under cover, then it becomes not only liable to Contribution if saved, but entitled to Contribution if lost."—2 Smith's Leading Cases, 531; *Gould v Oliver*, 4 Bingham, N. C. 134; *Brown v Cornwall*, 1 Root (Cow) 60; *Barbour v Bruce*, 3 Conn. R. 9; *Barbour v Dodge*, 5 Greenleaf (Maine), 286; 22 Pick. 116.

ENGLAND.—There exists in Liverpool a custom among the ship-owners, shippers, merchants and underwriters in the trade of carrying timber from British North America to England, which has been recognised by the courts as legal, that the loss occasioned by the jettison of timber loaded on deck, is not contributed for by any General Average among all the owners of the ship, freight and cargo on board, but the loss is apportioned over the ship, the freight of cargo both on and under deck, both jettisoned and not jettisoned, according to their respective values, by a statement which is called *General Contribution*, but no owner of any of the interests is, by the

custom, liable for the proportion falling on his interest, except those who are parties to the contract for the carriage on deck ; and no underwriter on the ship is liable, under the ordinary form of policy, to pay or contribute towards the amount of the general Contribution payable or borne by the ship-owners on account of the jettison of any timber stowed upon deck. *Miller v Letherington*, Ex. Ch. 1863.

Mr. *Arnould*, p. 890, says, “ Goods carried on deck, as they tend to embarrass the navigation, are not contributed for, if jettisoned, unless they are so carried according to the common usage and course of trade on the voyage for which they are shipped. On proof, however, of such usage, they are contributed for if jettisoned, like other goods ; and no notice to the underwriters of the existence of such custom is necessary in order to make them liable, they being bound to know the usage of the particular trade. Thus, carboys of vitriol, timber on the voyage between London and Quebec, and pigs between London and Waterford, have been contributed for, after jettison, though carried on deck, an usage of trade being proved, in each case, so to carry them.” He supports his statement by reference to the great *French* writers on Insurance, Emerigon and Valin, and by the *English* decisions in the cases of *Ross v Thwaites*, *Da Costa v Edmonds*, *Gould v Oliver* and *Milward v Hibbert*.

In practice, however, the *English* underwriters do not admit the General Contribution as binding on them, unless their consent to risk of deck cargo has been especially obtained previously.

The FRENCH and BELGIAN codes authorize the master,

in short voyages along the coast, and as far as the southern and eastern coasts of England, to carry cargo on deck, and, if jettisoned, it is allowed for in General Average. The merchants and underwriters in both countries complain against the law, that it does not define the limits of these short voyages, but they are left to be ascertained by ancient and vague ordinances. They also allege that, even in these short voyages, the custom of carrying goods on deck is hazardous and injurious to the interests of commerce. *Frignet*, 351. *Rogron Art.* 421.

HOLLAND.—The master is held responsible for every damage which may happen to goods carried on deck without the consent, in writing, of the shipper; but when they are so carried without such consent, and are damaged or jettisoned, the damage or loss is made good in General Average, and the contributors have their remedy over against the captain and the ship. *Dutch Commercial Code*, §§ 348–733.

The new GERMAN code allows, in General Average, a jettison of deck cargo in coasting voyages. § 710.

Freight of Jettisoned Goods.

UNITED STATES.—In case of jettison of goods, as the ship-owner cannot entitle himself to the freight of them, as he is prevented from delivering them at the port of destination, this freight is included in the amount of sacrifice, and must be contributed for. The *Nathaniel Hooper*, 3 Sumner's R. 542.

The freight contributed for in General Average, contri-

butes on the whole amount, and the deduction of one-half or one-third to cover expense of earning freight, is taken from the freight actually earned only.

ENGLAND.—The owner's freight being, so to speak, contained in the goods, shares the fate of the merchandise, and is jettisoned with the goods thrown overboard. The lost freight is, therefore, also recoverable by General Average Contribution. *Hopkins*, 10.

FRANCE.—The practice is the same as in England.

Jettison of ship's stores.

The practice in the *United States*, *England* and *France* is, that of the ship's stores cast into the sea, only those are allowed to enter into the General Average, which were in secure and proper situations previously.

Water casks on deck.

UNITED STATES.—If jettisoned from the place where they are usually and properly carried, they are allowed for in General Average.

In *England* and *France*, they are not contributed for.

Jettison of chains on deck.

UNITED STATES.—If jettisoned from the place where they are usually carried, they are contributed for.

ENGLAND and FRANCE.—Not General Average, except when in the vicinity of land.

Ship's stores in a state of wreck.

Considered part of the accident which reduces them to a state of wreck.

Damage or loss to cargo, by being got on deck in order that it may be jettisoned, or to get at other goods which the crew intended to jettison.

UNITED STATES, ENGLAND and FRANCE.—General Average.

Damage to cargo, by water getting down the hatches whilst jettison is taking place.

The damage done to goods by water, which unavoidably goes down a ship's hatches opened, or other opening made for the purpose of making a jettison, is contributed for in General Average, in the *United States, England, France, Belgium Holland, Denmark* and by the new *German* code. (*French* code, § 400. *German* code, § 400. *Holland* code, § 699.) Such damage is considered as an accessory of the jettison, or the immediate direct consequence of making the jettison. 13 *Peters*, 343. *Baily*, 171.

Mr. *Hopkins* (an English writer) says "It sometimes happens that in opening the hatches to effect a jettison, an occasion which is necessarily most frequent in bad weather, water enters the hold by the hatchway, and injures the goods stowed in the neighborhood. On proposing this case there scarcely seems room for a doubt that such damage should be claimed in General Average, similarly to jettison, not only as being quite analogous to that, but actually involved in the act of jettison itself. Yet the question as to how such damage should be disposed of is by no means a settled one. I suppose few people would be found to dispute the *principle* which makes such losses General Average, except upon some fine drawn argument about the extent and intention, the mediate and immediate consequences of voluntary acts. Such reasonings appear too metaphysical to apply to mercantile questions, which should be answered in a simpler manner. I would only ask the advocates of such fine distinctions whether we can curb or prevent effects depending on such acts from extending far beyond the limits we at first intended. Take the analogous case of water poured on a burning house to extinguish the flames, which water destroys the books in the library; will any one urge in favor of an insurance office not paying, that damage by water was *only incidental* and unintentional, and, therefore, removed from the rule which makes the insurance company liable for fire? I am sure that no such argument would be maintained for a moment.

There is, however, more show of reason in an objec-

tion being made to this kind of damage constituting General Average, on the ground of *expediency*. This is the true root of the objection, which, when honestly avowed, is entitled to its full weight. In principle it does not seem to be of much importance whether cargo be thrown into the water or water be thrown into the cargo, provided the act were required for the salvation of the joint interests, and undertaken for that end. But if it be urged that the admission of claims of this kind is opening a dangerous door to fraud and leading the way to extreme uncertainty; if it can be shown that it is next to impossible to indicate what damage did really accrue in consequence of a voluntary act, and how much of it arose from leakage and other involuntary causes; if it be told us as a matter of fact, that when such a principle was acted on very numerous claims were made, especially in certain trades, which are known to have been fraudulent,—we should be right in saying, that though we adhere to our rule as a matter of principle, yet it may be better to depart from it in some cases on the ground of convenience and for the avoidance of fraud and uncertainty, and to draw some arbitrary lines,—only admitting frankly that they are arbitrary, and are drawn on account of the reasons stated. But I would never resort to this arbitrary line where a case is clear, definite and free from suspicion. In the instance under discussion, I have always been of opinion that this description of danger is most properly General Average, and should not be rejected from recovery as such except where un-

certainly prevails as to its cause and limits." *Hopkins*, p. 14.

Damage done by breakage and chafing, or otherwise, from derangement of stowage consequent upon a jettison.

In the UNITED STATES, FRANCE and HOLLAND, this damage is in practice generally allowed in General Average. In *Lee v. Grinnell*, 5 Duer, 429, 310, damage to the knees and timbers of the vessel, caused by the swelling of grain in the lower hold, which was caused by letting water into the vessel by scuttling, was allowed in General Average.

The ENGLISH and BELGIC Average adjusters reject from Contribution damage caused by breakage and chafing resulting from a derangement of the stowage of the cargo, consequent on making a jettison. The damage, they argue, is caused by the unintended accidental derangement of the stowage, and not by making the jettison.

The International Congress held at York, in England, in 1864, recommended that this damage should be made good in General Average. *Report of Hon. Wm Marvin*, 20.

Damage or loss to cargo, by water getting down in consequence of a mast being cut away.

UNITED STATES.—General Average. In *Maggrath v.*

Church, 1 Caines, 196, the vessel loaded with corn, encountered severe weather, and a mast was cut away for the general preservation. In cutting it away, it was splintered, and in consequence thereof, water entered the hold, and damaged the corn. *Kent J.*, said:—"The corn being damaged by the cutting away of the mast, is to be considered, equally with the mast, a sacrifice for the common benefit—a price of safety to the rest; and it is founded on the clearest equity, that all the property and interest saved ought to contribute their due proportion." See also, *Saltus v. Ocean Ins. Co.*, 14 Johns, 138.

In FRANCE the rule is the same as in the United States, but in ENGLAND, it is at present a disputed question.

Damage or loss to cargo, by putting it into the water, or into lighters alongside a ship which is aground in order to get the ship off.

UNITED STATES.—Where goods are put into boats out of the usual course, for the purpose of floating the ship when she is aground, or to lighten her that she may pass over a shoal or bar, or otherwise for the relief of the ship and cargo, are lost, they are, in practice, contributed for.

A distinction is made between lightering the vessel in extraordinary circumstances, as in putting into a port of necessity, and in the ordinary course of the voyage, as in putting into the port of destination. Where

it is usual for vessels of the same burden, as the one in question, to discharge a part of the cargo on the outside of the bar of the port of destination, no contribution is to be made, though the goods should be damaged in the lighters. 2d *Phillips*, 78.

ENGLAND.—Where, in the course of the voyage, in order to save a ship from foundering, to float her after stranding, or to enable her to make a port of distress, part of the cargo is put into boats and lighters, and lost before reaching the shore, such loss gives a claim to General Average Contribution; for it is regarded as though it were a jettison (*proinde si jactura facta esset*), being an intentional exposure of the goods to imminent and extraordinary risk, with a view to the ship's safety. *Arnould*, 891. *Hopkins*, 14. *Marshall on Ins.*, 538.

FRANCE.—Disputed. *M. Cauvet*, in his *Traite sur les Assurances Maritimes*, however, says, when, in going into, or coming out of a port, harbor or river in the ordinary course of the voyage, it is necessary to lighten the ship, if any of the goods put on board the lighters be lost or damaged, the loss or damage is General Average.

Damage done to the ship in order to effect a jettison.

It is *universally* admitted, that all the damage incidentally done to the ship in making a jettison, constitutes a part of the amount to be made good in General Average.

Application of something belonging to the ship to a use different from that to which it is applied in the ordinary course of navigation.

If spars be cut up to construct a temporary rudder, or cordage be used to fasten it, or a cable or rope and spar be put out to assist in steering the ship in case of the loss of the rudder, or a part of the sails and cordage be used at sea in stopping a leak, or a cable be cut from the anchor to be used as a hawser, the loss and damage are *universally* subjects of General Average Contribution.

DAMAGE TO SHIP.

VOLUNTARY SACRIFICE OF SHIP'S MATERIALS OR OUTFIT.

Cutting away masts, sails &c., to righten a ship on her beam-ends.

It not unfrequently happens that by a sudden squall, or some similar cause, a ship under canvass, is thrown on her beam-ends, with her yard-arms and part of her sails in the water, and owing to the last circumstance, or from the shifting over of the cargo, she is prevented from rising upright again. To relieve her from this critical position, it becomes necessary to cut away the

weather rigging, the sails, or the masts themselves. This is a loss which is *universally* made good in General Average.

Whether a loss of sails and spars by carrying a press of sail to keep off a lee-shore, or escape an enemy, is a subject for contribution.

UNITED STATES.—In practice, they are not generally allowed, for the reason that, although the carrying of a press of sail is a voluntary act, yet it is done in the usual course of navigation; it is not a voluntary sacrifice of the thing lost. On account of the state of the weather, or the situation of the vessel, the sails and spars, though put only to their ordinary and accustomed use, are more than usually exposed to damage. Any loss, although it happen in consequence of what is thus voluntarily done, and for the general safety, is therefore considered as not coming strictly within the conditions of a General Average. In Louisiana, Contribution has been allowed, (*see Shiff v. Louisiana State Ins Co.*, 6 Martin, N. S., 629.) But in New York, Boston and other large shipping ports, the practice is not to admit the claim in General Average; though as the amount is often too small to admit of the loss being recoverable as a Particular Average, a very liberal construction has *occasionally* been put upon meritorious cases, and by consent of the underwriters and parties in interest the loss has been adjusted as General Average.

ENGLAND.—Mr. *Hopkins*, p. 34, states the practice

thus:—"A sail or other parts of the ship may be sacrificed without being cut away. A ship driving towards the shore in a gale or squall may have had her sails blown away by the violence of the weather, and it may be quite plain that any sail hoisted must almost inevitably meet the same fate; yet it may be the ship's only chance of escaping from that lee-shore, to set a sail or a tarpaulin in the rigging as a last resource, to try and wear her head round; and the purpose is sometimes answered if the sail, &c., so exposed last a few minutes or seconds only. This is an unusual service of the ship's furniture, and must rank as a voluntary sacrifice.

FRANCE.—When, in order to avoid capture or shipwreck, the master carries an extraordinary press of sail, whereby the masts are sprung or broken, the damage is General Average. *M. Cauvet*. The decisions of the courts however, are contradictory.

HAMBURG AND DENMARK.—They are contributed for in General Average. In *Belgium* the practice is the same as in the United States. The new *German* code declares,—“that damage done to the ship, its appurtenances, and the cargo, by carrying a press of sail, even when the press of sail was carried to avoid stranding or capture, is not General, but Particular Average. § 709.

Sails blown away when let go to righten the ship.

That sails blown away are subjects of contribution, when they are let go for the purpose of causing the

vessel when on her beam-ends, to right, is generally admitted. 2d *Phillips*, 1298. *Stevens & Benecke*, 185, 186.

Bulwarks cut away to relieve a vessel of water which floods her decks.

If the bulwarks or stanchions or bulkheads or decks of the ship be cut away for the purpose of saving the goods, this, in the *United States*, *England* and on the *Continent*, is regarded as General Average. *Nelson v. Belmont*, 5 Duer, 310.

Where the loss or damage is attributable to the usual chances and accidents of the voyage, whether a subsequent sacrifice consequent upon such loss or damage, constitute the whole a General Average—in other words, whether masts cut away when in a state of wreck, are contributed for.

UNITED STATES.—By some adjusters, the value of the wreck itself, as a wreck, is allowed in General Average, but this is not the general practice—their value in this condition would generally be nothing.

In *Nickerson v. Tyson*, 8 Mass., 467. The masts, spars, rigging and sails of a vessel at sea were carried away by the violence of the weather, and after hanging by the vessel's side for half an hour, were cut loose for the preservation of the vessel and cargo. The owners

were held not entitled to Contribution, unless, indeed, for the loss incurred in separating the masts and rigging from the hull, after they were carried overboard by the violence of the weather. The Contribution could be proportionate to the value of these articles, only when thus hanging by the side of the vessel.

ENGLAND.—Mr. *Arnould* states the rule as follows: “If a mast be carried overboard by the wind, it is, of course, only a Particular Average; if, however, a mast or spar be snapt or sprung by the wind, and left hanging in the rigging, so that in order to save the ship and cargo, it becomes necessary to cut away entirely both the mast and rigging, and throw both overboard, the damage caused by the act of so cutting them away is a General Average loss, and is to be contributed for to the extent of the value of the mast and rigging, as they lay after the accident.”

Mr. *Hopkins* says, in practice, they are not General Average, on the ground that the original cause is the accidental loss of the mast; and the cutting away afterwards is considered only the consummation of the inchoate act.

FRANCE.—“If the wind,” says *Pardessus*, § 738, “crack a mast, and afterwards it become necessary for the safety of the ship to complete the fracture, and throw it, with the sails and cordage, into the sea, this last measure would be General Average. Consequently the amount of this loss should be determined according to the value the mast and accessories had in its broken condition, caused by the wind or *par le cas fortuit*, in which broken condition, antecedent to the sacrifice, the

damage was Particular only.

M. Cauvet in his *Traite sur les Assurances Maritimes* states the practice thus: "When a mast is accidentally carried away by the violence of the winds, and it is necessary, in order to work the ship, to disengage the wreck from the ship by cutting the rigging which cannot be saved in the gale, the estimated value of the rigging and sails at the time and place of the sacrifice is allowed in General Average.." See also, *Rogron*, 400.

IN BELGIUM, in practice, one-third the value is considered as General Average, one third Particular and one-third new for old.

IN HOLLAND the value of the wreck, as such, is contributed for.

Damage to copper by wreck of mast cut away before it is finally released from the vessel.

UNITED STATES.—When masts and spars which have been cut away, in falling, injure the deck, destroy rails and bulwarks, and do other damage, the repairs of such damage belong to General Average. And if after the mastage has fallen into the water, it strike against the ship's sides and knock off or injure the metal sheathing, this damage is, in practice, also allowed in General Average.

ENGLAND.—It is held that the injury thus sustained by the sides and sheathing does not form an item for General Contribution, but falls on the ship alone.

Mr. Hopkins, p. 36, argues, "there can be little

doubt that, as a matter of principle, this practice is erroneous ; for it seems illogical, in a progressive series of consequences clearly dependent on, and traceable to, one cause, to classify a certain number of the links of the chain in the category, and to make a new rule for the succeeding link. I have listened to the arguments in favor of this distinction, and they have always appeared to me unconvincing enough. In fact, it is one of those subjects where argument is misplaced ; for it is *expediency* and not *principle* which draws the arbitrary line of demarcation. It may be advisable to stop short in the middle of a train of consequences, when difficulties might arise in following them out to their extreme limits—but if so, it ought to be done simply *as* a matter of convenience or custom, and should not be attempted to be defended on other grounds.”

In FRANCE the injury is not contributed for.

A spar or sail cut away to save a mast.

In the UNITED STATES, it is contributed for in General Average, if the cutting away be the means of saving the mast.

In ENGLAND it is not allowed:

Stern boat cut away.

UNITED STATES.—The right to claim Contribution depends upon the usage to carry the boat in this situation,

and upon the expediency of so carrying it. The loss of a boat, cut away from the stern-davits, was considered to be a subject of General Average. *Lenox v. United States Ins. Co.*, 3 Johns Cas., 178. See also *Hall v. Ocean Ins. Co.*, 21 Pick, 472. 2d *Phillips*, p. 75. 1 *Parsons*, p. 289.

Anchor and chain voluntarily slipped, to avoid being driven on shore, or to escape an enemy, or running foul of other vessels, or to avoid any other impending peril.

UNITED STATES.—When a ship at anchor is in danger of driving on a lee-shore, during a gale, or when another vessel riding near her, is driving towards her, and a collision becomes probable, or when in violent weather it becomes necessary to leave an anchorage, it being no longer safe to remain there, and it is found impossible to weigh the anchors; or when to extricate a vessel that has got ashore, her anchors and cables have been carried out for the purpose of heaving her afloat; when in any of these cases the general safety is secured by slipping from or cutting away the ground tackle, such loss is made good in General Average.

The ropes or chains must really have been cut or slipped for that purpose; and there must have been some reasonable expectation that their sacrifice would produce the effect desired and intended. Proper precautions should be taken for the recovery of the anchors and cables, by having buoys attached to them previously to slipping.

In making—good anchors and cables slipped, it is the custom to charge the entire cost of the anchor, and two-thirds of a rope cable; also two-thirds the price of a chain cable. When chain cables were introduced in this country, they were by many insurance companies exempted from the deduction of a third new for old, for the purpose of encouraging the introduction.

ENGLAND.—If a vessel be driving with her anchor down; or being in danger she let go her anchor, and it hook or drop into moorings, rocks &c., and she be obliged to slip, then it becomes General Average. It is the custom to charge five-sixths of the price of a chain cable to General Average.

FRANCE.—When the master has anchored in the course of the voyage, and a sudden change of wind endangers the ship, and the danger is so pressing that it is necessary to the safety of the ship to fly immediately without waiting to weigh anchor, and the master slips the chain, the abandonment of the chain and anchor in such cases is General Average. It is the duty of the master to attach a buoy to his anchor when he can, and if he fail in this duty he cannot recover its value in General Average. If he regain the anchor, it is the cost of repossessing himself of it that is allowed. *M. Cauvet. Traite sur les Assurances Maritimes.*

When anchor, temporarily foul, is slipped to avoid imminent peril.

In case of a vessel fouling another ship's ground

tackle, and slipping from her cable to extricate herself if the anchor could have been recovered in ordinarily fine weather, but a gale coming on makes it highly dangerous for her to remain where she is, and the cable is in consequence cut or unshackled, the loss is UNIVER-
SALLY admitted to be General Average.

When foul under ordinary circumstances.

Not General Average.

If an anchor by which a vessel is moored, be lost by the parting of the cable, the loss is denominated "wear and tear," and is borne alone by the owner. It is an ordinary casualty to which vessels are liable. In fine weather and usual circumstances the chain, in this case, then hanging loose, would be hove on board again. But if after the parting, the ship drive and be in danger, and the crew be too much occupied in other necessary manœuvres to heave in the chain, or if the chain by its weight list the vessel dangerously on one side, the loss of the remainder of the chain by slipping it is made good by General Average Contribution.

Loss of a chain and anchor, by anchoring of necessity under extraordinary circumstances in an unusual and dangerous place.

UNITED STATES.—There is a diversity of opinion on this question. Some adjusters are of opinion that this dam-

age, whether it happen in the usual course of the voyage, or under extraordinary circumstances, is a part of the "wear and tear" of the ship, for which the owner is entitled to no Contribution from the owner of the cargo, or indemnity from his underwriters.

If the vessel be obliged to anchor in an unusually dangerous place to avoid a worse danger, for instance, going upon a lee shore, and can escape from this perilous situation only by cutting or slipping her cable, or if the place of anchorage be a foul and rocky bottom, and the cable be consequently chafed asunder by the friction, or the anchor so firmly wedged that it cannot be weighed, and if, by the anchoring, it be evident that the vessel and cargo have been preserved from a peril which threatened them with inevitable destruction ; the loss of the chain and anchor, or the expense of recovering them under such circumstances, should certainly be made good by General Average Contribution ; though on *principle*, as the damage thus incurred, was not intended or anticipated as the result of the act, as it was directly caused not by the agency and will of man, but by the force of the elements, it is not General Average. We think, however, that adjusters would be perfectly safe in treating the loss as General Average, for the parties interested would scarcely object to a payment productive of so much advantage to themselves, and only questionable on theoretical grounds.

We have perhaps stated one of the most urgent cases that could occur, but it is one which happens more fre-

quently than others. The Adjuster must be governed by the facts in each case, where the anchoring was apparently voluntary, and not clearly for the purpose of saving the property from some peculiar peril, it should not be regarded as General Average.

That the *principles* of General Average are against the allowance, see 2nd *Phillips*, § 1296. 1 *Parsons*, 290. 2nd *Arnould*, 897.

But when a ship in her ordinary navigation, drops her anchor among rocks, or moorings of other vessels, and afterwards finds it impossible to weigh it, and is in consequence obliged to unshackle the chain or cut the rope cable, the loss is borne by the owner; for the anchor and cable were in fact lost as soon as they were dropped, just as much as if the cable had immediately broken. They were in a situation from which they could not be recovered, and so there could be no claim as for a voluntary loss. If, however, a vessel be driving with her anchor down, or being in danger she let go her anchor, and it hook or drop into moorings, rocks, &c., and she be obliged to slip, then it becomes General Average.

If an anchor by which a vessel is moored, be lost by the parting of the cable, the loss is denominated "wear and tear," and is borne alone by the owner. It is an ordinary casualty to which vessels are liable.

When anchors and cables are regained after others have been bought to replace them, they are generally sold for the benefit of those concerned with their loss, and the net proceeds of their sale, after deducting the salvage and other expenses, go in reduction of the cost of

new anchors and cables. If they be picked up previously to new ones being purchased, then the salvage and all other expenses of the recovery are chargeable to General Average.

ENGLAND.—Mr. *Arnould* says, though the *principle* is not admitted to be General Average, in *practice* the loss is not unfrequently treated as such.

FRANCE.—Not General Average as a rule.

GERMANY.—The question whether this loss should be regarded as General Average, has been a fruitful subject of discussion among the German lawyers, and in meritorious cases the claim is allowed.

Damage caused by steamers or lighters, in forcing off a stranded ship.

General Average when unavoidable.

Damage by steamers or lighters in forcing off a stranded ship, when the result of mismanagement.

Not General Average.

Voluntary Damage to ship, which is nevertheless totally lost, part of the cargo being in lighters, and thus saved at the time of the voluntary sacrifice.

UNITED STATES.—In case of a sacrifice of a part of the ship or cargo, for the general safety, if the property es-

cape the impending peril and be saved, a contribution is to be made by what is finally saved of the ship, cargo and freight. But if the goods thrown overboard, or put into boats, for the general safety, be saved, and the ship and rest of the cargo be lost, no contribution is to be made. If, however, the ship escape the peril on account of which a jettison is made, and be afterwards wrecked, still whatever is saved from the wreck must contribute for the jettison.

In ENGLAND and FRANCE the rule is the same.

Damage to ship, by voluntarily running the ship on shore.

In the UNITED STATES, the damage by intentional stranding, to avoid shipwreck, or loss, is a subject for General Contribution.

Mr. *Arnould* states the law on the subject of voluntary stranding, in *England*, to be “where the ship is voluntarily run ashore to avoid capture, foundering or shipwreck, and is afterwards recovered so as to be able to perform her voyage, the loss resulting from the stranding is to be made good by General Average Contribution.—There is no rule more clearly established than this by the uniform course of maritime law and usage.” And after quoting the corresponding dictum of *Emerigon*, Mr. *Arnould* goes on to say: “The rule has been laid down in the same way by Lord *Tenterden* in this country, and by

Chancellor *Kent* in the United States, where it has received the sanction of several decided cases." *Arnould* on Ins. p. 898. But notwithstanding the opinion of this distinguished English writer, the uniform practice of the Average Adjuster is to disallow the loss or damage in General Average. The question has never been decided by the courts in England.

Mr. *Hopkins* (page 40) says "The underwriters at Lloyds, put forward two reasons to show that this damage is not of the nature of General Average. 1st, The indefiniteness of the injuries to the ship purposely entered upon by running her ashore. 2nd, That in the case of a ship about to founder; being run ashore, her impending fate was not probable, but absolutely certain. Had she been left at sea she must have sunk; and the driving her on rocks or sands was a desperate measure, a mere *saute qui peut*, and that consequently any danger so incurred must be borne individually by the sufferer, and not be made good by General Contribution," and he adds "Though this reasoning has been left unquestioned through a long series of years, the argument is not sound. In all cases of General Average it is the rescuing the joint interests from threatened loss or injury which is the ground of the claim; the more imminent the danger avoided, the more clear is the advantage gained through the means employed. If the dreaded destruction of ship and cargo seemed, at the moment it was escaped, an absolute certainty, the more cheerfully, it is to be supposed, would all the persons whose property has been

saved, join in reinstating the loss of the suffering proprietor. If I give my hearty thanks to the man who saves me from drowning by snatching me out of the shallow water into which I had just fallen, are not my gratitude and rewards due in a yet higher degree to him who brings me on shore out of deep water, when my life was on the very verge of extinction? And if the saving of a ship and her cargo, by some voluntary act, from possible loss be the ground of General Average Contribution, *a fortiori*, it must be the ground of the same when the probabilities of loss have so increased as to amount to an almost certainty."

We agree entirely with Mr. *Hopkins*, that the reasons given by the Lloyd's underwriters against this damage being contributed for, viz: that "the impending fate of the vessel was not probable, but absolutely certain," is without sufficient foundation, the same reason could apply as well to all other cases of jettison, for if the danger be not so great that the loss is otherwise inevitable, where is the right of the master to anticipate or hasten the destruction of any part of the adventure? Does a master ever make (rightly) a jettison, cut away a mast, or run his ship ashore, unless the loss at the time he resolves on the measure be inevitable unless he resort to it? Is the master to throw over cargo, or mutilate his ship out of mere apprehension? Does he ever do it unless all reasonable hope of otherwise saving the adventure be gone? He is not to be justified in a fear from slight causes, nor in anticipating that total destruction to a part which

awaits the whole adventure, unless to all human judgment safety from any other measure be hopeless. When the ship has been overcome in her struggle with ocean and tempest, and is in danger of foundering, and when lightening her is the only measure to avert this otherwise certain peril, then first arises the right to throw over the cargo; it is a right only born at the last degree of distress in his ship. If it can be shown that the vessel was not in much danger, that she would not in all human judgment sink unless relieved, the jettison would be unwarranted, so too in any case of voluntary stranding, if it could be shown, that, by any means in the master's power, by holding on to anchors, or by making a pressing sail, he could avoid the danger, he is not warranted in beaching his ship. The peril, therefore, being in its nature *inevitable*, so far from being a reason to prevent a contribution, is on the contrary essential to it. The greater the danger and the more inevitable by any other means than by measures to anticipate its action, the more justifiable is the act of courage thus anticipating it, and the more rightful the demand of Contribution.

FRANCE.—The damage by voluntary stranding is allowed in General Average, provided the ship be got off with her cargo on board, or if, the cargo having been landed, she take her cargo again on board and proceed to a port of refuge or resume her voyage. *Cauvet*, § 345-7. The Marine Ordinance of Louis XIV, declares, "that if the jettison save not the ship there is no ground of contribution." This provision of the ordinances, taken

from the Rhodian law, was incorporated into the existing French code, and is found in many of the maritime codes of Europe. "Commentators are agreed," says M. *Cauvet*, "that the word jettison, as here used, is to be taken in an enlarged sense, and as an example of all sacrifices." If, therefore, the ship, though voluntarily stranded, be not saved, there is no Contribution. "If the voluntary stranding be followed by shipwreck," says Emerigon, it is 'sauve qui peut'—'save who can!' *Meredith's Emerigon*, 475.

In the UNITED STATES, there was conflicting authority, whether there is to be Contribution, if the vessel be, by the stranding totally lost, until the decision of the Supreme Court, in the case of *Barnard v Adams*, 10 Howard, 270, which has settled that Contribution is to be allowed.

The new GERMAN code (§ 708) declares, that "damages caused by voluntary stranding in order to avoid capture or sinking, are General Average; but if the stranding were in order to avoid *sinking*, and the ship be not got off, or after being got off be found incapable of repair, the damage is not General Average.

The SPANISH code (art. 933) declares, like the French, that "if the vessel be lost notwithstanding the jettison, the damage shall be Particular." This language, taken substantially from the French code, is probably interpreted by the tribunals of Spain in the same manner, and, as a consequence, unless the vessel be saved, there is no Contribution.

The maritime codes of HOLLAND, NORWAY, SWEDEN and

DENMARK all make damage to ship or cargo caused by a voluntary stranding, in order to avoid capture or foundering or other imminent danger to ship and cargo conjointly, General Average, and without regard to the question whether the ship be subsequently refloated or not.

When a ship is in peril so imminent that her total loss is inevitable, to all appearances, is a voluntary stranding made with a view of saving the ship and her cargo from total destruction to be contributed for in General Average, in the event of anything being thereby saved?

In the UNITED STATES this question was considered settled by the Supreme Court in December Term 1850, in the case of the ship "Brutus." (*Barnard v. Adams*, 10 Howard, 270, 302). Mr. Justice Grier, delivering the opinion of the court, said: "The ship 'Brutus' was lying at anchor at the usual place of mooring vessels in the outer roads of Buenos Ayres, about seven miles from the shore. The width of the river at that place, between Buenos Ayres and Colonia on the opposite shore, is about fifteen miles. The Brutus had taken her cargo on board for New York, consisting of skins, dry hides, horses and jerked beef. The master was on shore, and she was in charge of the first mate, with a crew consisting of twelve persons in all. On the 7th a gale had commenced, which on the 8th had become dangerous. About four o'clock the next morning, the ship began to

drag her anchors, and the small bower anchor was let go. About nine o'clock in the evening, the gale increasing, the best bower anchor parted with a loud report. About ten o'clock the small bower parted, and the ship commenced drifting broadside with the wind and waves. Endeavors were then made, to get the ship before the wind, which failed on account of the chains keeping her broadside to the sea, which was making a breach over her fore and aft. The chains were then slipped and the vessel got before the wind, two men were put to the wheel, and one man to the lead, and it was determined 'to run the ship ashore for the preservation of the cargo and the lives of the crew.' It was then about eleven o'clock at night, when the ship was got before the wind and under command of the helm. The shore next to Buenos Ayres, towards which the ship had been drifting, had banks and shallows extending out some three or four miles. If the vessel had been driven on these by the tempest, she would have been wrecked and lost together with the cargo and crew. On the Colonia side of the river, were sunken rocks several miles from the shore. 'For the purpose of saving the cargo and crew any how, and possibly the vessel,' she was steered up the river, inclining a little towards the Buenos Ayres side, with the intention of running her on shore at a convenient place. After they had proceeded up the river, about ten miles, the mate discovered from the flashes of lightning, that the vessel was approaching a point called St. Isidro, off which he

perceived something black, which he supposed to be rocks, and being afraid, or 'thinking it impossible to get by' this point without being wrecked or lost, he directed the course of the vessel to be changed towards the shore, where he had seen what he supposed to be a house, but which turned out to be a large tree. About midnight the vessel struck the beach, and the rudder was knocked away. The fore-sail was then hauled up, but the stay-sail was let remain to keep her head straight, and she continued to work herself up until daylight. The place where she was stranded was a level beach about 200 yards above ordinary low water mark. The ship was not wrecked or broken up, though somewhat damaged, and the cargo was not injured. The master chartered the Bark 'Serene,' and transferred the cargo to her. But it was found that, with the means to be obtained in that vicinity it would have cost more than the ship was worth to get her off the beach. She was therefore sold. The 'Serene' afterwards arrived safely at New York, under command of Captain Adams, former master of the 'Brutus.' In transshipping the jerked beef from the 'Brutus' to the 'Serene,' a portion of it got wet, and when it arrived at the port of New York, it was all found to be worthless.

* * * * *

"It cannot be denied by any one who will carefully compare this case with that of the '*Hope*,' (13 Peters, 331), unanimously decided by this court, and the cases of *Caze v. Reilly*, (Wash. C. C. R., 298), *Sims v.*

Gurney, (4 Binney, 413), and *Gray v. Waln*, (2 Serg. & R., 229), which have received the ‘unqualified assent’ of this Court, that whatever distinctions may be taken as to the accidents and circumstances of these cases, they do not materially or substantially differ from the present, so far as the point now under consideration is concerned; and that we are now called upon to reconsider and overrule the doctrine established by those cases. But however they may appear to be contrary to certain abstract propositions stated by some text writers on this subject in England, and a case or two in this country, the policy and propriety of overruling our own and the three other decisions which have received our ‘unanimous approval,’ even if we be not now satisfied with their correctness, may well be doubted. There are few cases to be found in the books, which have been more thoroughly, laboriously and ably investigated, by the most learned counsel and eminent judges. In questions involving so much doubt and difficulty, it is of more importance to the mercantile community, that the law be settled and litigation ended, than *how* it is settled. No decision of a question depending on such nice and subtle reasoning will meet the approbation of every mind, and if the cases we have mentioned, have failed of this effect, it may well be doubted, if any reasons which could be given for overruling them would prove more successful. * * * * * The law of General Average has its foundation in equity. The principle, that, ‘what is given for the general benefit

of all, shall be made good by the Contribution of all,' is recommended not only by its equity, but also by its policy, because it encourages the owner to throw away his property without hesitation, in time of need."

"In order to constitute a case for General Average, three things must concur. 1st. A common danger; a danger in which ship cargo and crew all participate; a danger imminent, and apparently 'inevitable' except by voluntarily incurring the loss of a portion of the whole to save the remainder."

"2nd. There must be a voluntary jettison, *jactus*, or casting away of some portion of the joint concern for the purpose of avoiding this imminent peril, *periculi imminientis evitandi causa*, or, in other words, a transfer of the peril from the whole to a portion of the whole."

"3rd. The attempt to avoid the imminent common peril must be successful. It is evident from these propositions, that the assertion so much relied on in the argument, viz: 'That if the peril be inevitable there can be no Contribution,' is a mere truism; as the hypothesis of the case requires that the common peril though imminent, shall be successfully avoided. Those who urge it must therefore mean something else. And it seems when more carefully stated, to be this: 'That if the common peril were of such nature, that the *jactus* or thing cast away to save the rest, would have perished any how, or perished 'inevitably,' even if it had not been selected to suffer in place of the whole, there can be no Contribution. If this be the meaning of this proposition, and we can discover no other, it is a denial

of the whole doctrine upon which the claim for General Average has its foundation. For the master of the ship would not be justified in casting a part of the cargo into the sea, or slipping his anchor, or cutting away his masts, or stranding his vessel, unless compelled to do it by the necessity of the case, in order to save both ship and cargo, or one of them, from an imminent peril which threatened their common destruction. The necessity of the case must compel him to choose between the loss of the whole and part; but however metaphysicians may stumble at the assertion, it is this forced choice, which is necessary to justify the master in making a sacrifice, (as it is called) of any part for the whole. Hence, the answer of every master of a vessel when examined, will be, 'I considered the destruction of both ship and cargo 'inevitable' unless I had thrown away what I did.' 'The goods thrown away would have gone to the bottom any how.' If the case do not show that the jettison was 'indispensable' in order to escape the common peril, the master would himself be liable for the loss consequent therefrom. It is for this reason, that the ordinances of Marseilles, require that the master should have a consultation with the supercargo and crew, as to the absolute necessity of the measure, and as evidence that it was not done through the vain fears, cowardice or imprudence of the master. But the right to Contribution was not made to depend on any real or presumed intention to destroy the thing cast away, but on the fact that it has been selected to suffer the peril in place of the whole, that the remainder

may be saved. The anchor lost by voluntarily slipping the cable may be recovered, the goods jettisoned may float to the shore and be saved, and yet if the anchor or goods had not been cast away, they would have been 'inevitably' lost, and there would have been a total loss of both ship and cargo. Take the case of *Caze v. Reilly*. A vessel completely surrounded by the enemy's cruisers. It is impossible to save both ship and cargo from capture and a total loss. A part or the whole of the cargo is thrown overboard, and thus the vessel escapes. This is an admitted case for Contribution. And it is no answer to the claim of the owners to say, 'Your cargo was 'inevitably' lost; as it was situated it was worthless, and consequently you sacrificed nothing for the common benefit. Besides a portion of it floated on shore and was saved from capture or was fished from the bottom without sustaining much injury; the throwing it overboard was the best thing that could be done for it under the circumstances, as without that it would have been 'inevitably lost.' But suppose, as in the case referred to, the ship cannot be saved by casting the cargo into the sea, but the cargo which is of far greater value, can be saved by casting the vessel on the land, or stranding her. Is it any answer to her claim for Contribution, to say, that her loss was 'inevitable,' she was in a better situation on the beach, than in the hands of the enemy, or at the bottom of the sea, or wrecked upon rocks, and therefore there was no such sacrifice as would entitle her to Contribution? We cannot comprehend why this argument should have no

weight in the first case (which is an admitted case of Contribution in all the books), and yet that it should be held as a conclusive obstacle to the recovery in the latter. The replication to this objection in the first instance, and the conclusive one, is, 'the vessel and cargo were in a common peril, where both or all could not be saved; the vessel alone, or the vessel and part of the cargo has been saved, by casting the loss upon the cargo, and this constitutes the very hypothesis on which the doctrine of General Average rests.' Why then should there be a difference in principle, where the cargo is damaged or lost, by being cast into the sea, and the ship saved; and the case, where the ship is damaged or lost by a voluntary stranding, or by being cast on the land, and the cargo saved, is a question which has never yet been satisfactorily answered. In fact, we do not understand the counsel to contend that the *Brutus* was not entitled to Contribution, because she could not be got afloat at a less cost than her value. The principle on which the counsel relied, is that enunciated in the opinion of the court in *Walker v. United States*, 11 Serg. and R. 61. 'It is not enough,' says the learned Judge, 'that there be a deliberate intent to do an act which may or may not lead to a loss; there must be a deliberate purpose to sacrifice the thing at all events, or at the very least to put it in a situation in which the danger of eventual destruction would be increased.'

* * * * *

"The fact that goods thrown overboard are in no

worse or even a better condition as to chances of safety than if they had remained on board, or that the stranded vessel is in a better condition than if she had been wrecked or sunk, cannot affect the right to Contribution of that part which was selected to suffer in place of the whole. * * * Let us briefly compare the facts of this case with the principles we have stated and inquire, 1st, What was the common peril, and 2nd, Was any portion of the joint adventure saved from it, by the transfer of the risk or loss to another."

"The common peril, which in this case was sought to be avoided, was shipwreck, or the destruction of vessel, cargo and crew. The ship lay at anchor—she was assailed by a violent tempest—her cables broken—her anchors gone; and she was being driven by the force of the gale broadside upon the shallows extending three miles out from the shore at Buenos Ayres. In order to save the cargo and crew, it is determined to put on sail and run up the river to find a safe place to strand the vessel. They proceed ten miles up the river, when they encounter another peril at Point St. Isidro. To avoid being wrecked on the rocks the course of the vessel is immediately changed, and she is steered directly for the shore, and run upon a sandy beach where she is left high and dry by the tide. The cargo is saved without injury, but the ship is on the land, where she is comparatively valueless, on account of the expense which must be incurred to replace her in her element. By the will and directions of the master, she has become the victim, and borne the loss, that the cargo might

escape from the common peril. It is true she has not been wrecked or lost, as she inevitably would, had she been driven on the flats, by the tempest at Buenos Ayres, or been foundered on the rocks off Point St. Isidro, but she has voluntarily gone on shore, which was death to her while it brought safety to the cargo. *And we are of the opinion that she has the same right to demand Contribution, that the owners of the cargo would have had against her, had it been cast into the sea to ensure her safety.*"

This important decision, therefore, seems to establish the law, that, where the situation of the ship is such, that the power of voluntary action remains, so that notwithstanding the fury of the elements, the point of stranding may be selected, and benefit results from the change in the course of the ship; or if the place where she actually takes ground be of such a nature as to involve less danger to the cargo, than that to which she was drifting before her course was altered, it constitutes a claim for General Average Contribution.

Damage done to ship by scuttling to extinguish fire.

This damage is in the UNITED STATES, FRANCE, HOLLAND and BELGIUM, allowed in General Average.

Mr *Arnould*, (vol. 2, p. 900), states the law in *England* to be: "If part of the ship be intentionally cut away and damaged, in order to come at or extinguish an accidental fire, which threatens the destruction of both

ship and cargo, there can be no doubt that such damage gives a claim to Contribution." According to the English *practice* however, the means taken to extinguish fire, as by pouring water into the hold, and the scuttling of the ship to sink her, are not allowed to constitute a General Average. Whatever damage the cargo may sustain by that course must be borne by the cargo, and the ship must bear by itself all injury done to it.

The damage done to ships, in order to extinguish the spontaneous combustion of part of the cargo, has been held both in *France* and the *United States*, not to give a claim to contribution *Crockett v. Dodge*, 3 Fairfield R., 190. *Emerigon*, chap. xii., sec. 17, vol. 1, p. 430, ed. 1827.

Damage to ship by worms, at a port of refuge.

Not allowed in any country, so far as we can ascertain.

Damage to ship by defence against pirate or enemy.

The damages received by a vessel whilst defending herself against an enemy, are not claimable as General Average; nor the cost of the ammunition expended; nor the expense of curing the wounds of the crew so engaged. This rule appears to be *universal*.

Mr. *Benecke* is of opinion, that damage to ship and cargo by an engagement with an enemy in defence of

the property, ought to be a subject of General Average. (London ed., 1824, p. 231).

No decision to this effect has, however, been made in England or the United States, but on the contrary, it has been held in England, that the claim cannot be sustained. In *Taylor v. Curtis*, 6 Taunt; 608, claim was made for Contribution for damage sustained by an English merchant vessel, in beating off an American privateer; and for expenses incurred in healing the wounded seamen. Chief Justice *Gibbs* said: "It was the duty of the sailors to defend the ship. By so doing all parties have been benefitted. But in what respect have the captain and crew exceeded their proper duty? What sacrifice have they made which they were not bound to make? The expense of medical and surgical aid must be borne by the parties themselves. I am of the opinion that it does not fall within the principles of General Average." Mr. *Holt* gives reasons in support of this opinion. 1 *Holt's R.*, 194.

With regard to a ship of war, it is obvious, that the damage caused by fighting is no more than an ordinary sea risk,—a loss caused by the perils insured against in the usual and ordinary course of the ship's duty as an armed vessel, and not an *extraordinary* measure resorted to for the general benefit; but with regard to a merchant vessel resorting to the measure of resisting a vessel of superior power as a desperate and only means of saving both ship and cargo from capture, the loss thence arising appears on principle, a fair subject for General Average Contribution; it is a loss which is the direct and anticipated result of an *extraordinary*

measure resorted to as the only means of saving the whole adventure from imminent peril; and ought not, it should seem, to be regarded as falling within the scope of those ordinary duties of the navigation to which the owner is bound by his contract with the freighter. *Arnould*, 897.

Mr. *Stevens* (Stev. & Ben., 5th ed., 36), admits that there should be a distinction made between the two cases, but considers that even in the case of a merchant ship the loss so incurred would not be General but Particular Average; though he acknowledges that many well-informed underwriters think it should be General Average; it seems, on principle that they are right.

Casaregis (Disc. 46, n. 43, 44), says, "the damage to the ship and cargo by fighting is Particular Average, but if the engagement were intended merely for the defence and safety of the ship and cargo, all the expense of the engagement, including that of healing the wounded and the reward to the men for their bravery, are subjects of Contribution."

Anchors and chains damaged in forcing a stranded ship off.

General Average, if the measures taken to refloat the ship be successful.

Sails damaged in forcing a stranded ship off.

General Average, if successful.

Boats lost or damaged, in forcing a stranded ship off.

General Average.

Damage to ship, by sails cut and altered to serve for others lost.

In the *United States*, the damage to sails cut up and destroyed to fit the place of other sails previously lost, is not allowed in General Average, for the reason, that they have only been applied to the purposes originally intended when put on board, viz:—the safe navigation of the ship.

Damage to ship's materials by using them for purposes for which they were not constructed, in order to save all the interests concerned during imminent peril.

UNITED STATES.—If any part of the ship or her tackle be applied for the common benefit to some purpose *different* from its ordinary use, the loss thence arising is a General Average loss, as if spars be cut up to construct a rudder, or sails and cordage used to stop a leak, &c.

ENGLAND.—In general, the diversion of stores or any

materials of a ship from their original and intended purpose, to some other use necessary but not contemplated, brings them within the class of General Average. So, sails used to cover the decks or hatches after an accident to prevent water going below, or hauled under the ship's bottom to stop leaks there; so, a hawser or ropes employed to support a mast or secure a rudder; so, even, coils of new rope, being the ship's stores, used on any extraordinary emergency for the general safety of ship, cargo and freight; so, ropes and other articles used for chocking and securing a cargo of iron or other heavy goods which has broken adrift in the hold and endangers the general safety, are all classified under this head. But if, when owing to straining, the decks have become leaky, and to protect the cargo below from drip, sails be taken into the hold to cover the perishable merchandise and be thus injured or destroyed, the case is different; the sole object of the sails being so used is to cover the cargo and prevent injury to it, and the loss or damage received by them is applicable to the cargo only.

Mr. *Arnould*, vol. 2, page 897, cites a case, (*Birkley v Presgrave*, 1 East, 219) where, in order to prevent a ship which was lashed to the head of a harbor pier, from being drifted thence by the fury of a storm, and sunk on the bar of the harbor, the master cut the cable of his best bower anchor, and with that fastened her to the pier, it was held that the damage thereby done to the cable was a General Average loss.

And the decision was the same in a case, where the master, impelled by necessity, cut away his cable from

the anchor to act as a hawser. *Marsham v Dutrey*, select cases of Evidence, 58.

IN FRANCE, SPAIN, HOLLAND, BELGIUM and *other maritime countries*, the rule is, without exception, as far as we can learn, to make good in General Average, the damage sustained to ship's materials by using them, for the common benefit, for purposes for which they were not constructed.

Jury masts and Ship's stores used in securing masts.

General Average in most cases.

Whether the accidental stranding is to be deemed a voluntary or intentional stranding within the meaning of the law, when it appears that the stranding was either directly or incidentally occasioned by the intentional exposure of the vessel to extraordinary perils out of the usual course of navigation, and of the ship's duties as a common carrier.

No case, in either the *United States* or in *Europe*, has yet determined that accidental damage, to the risk of which the deviation has exposed the vessel or cargo, should be Contributed for in General Average; and especially in the case of loss or damage by stranding, the language of the American and English books is uniform, that to make a stranding a General Average loss, it must

be the immediate result of the act and volition of man directed toward that particular object.

An accidental stranding which was the consequence of risks incurred by deviating to repair damage occasioned by a *vis major* or *cas fortuit*, is not General Average.

When, however, a part of the cargo is selected from the rest to be subjected to an extraordinary peril, as by being placed in lighters, the loss of it in consequence must be contributed for, yet the same principle does not apply to the ship, for the carrier is bound by the contract to expose the vessel and her furniture, if necessary, tho' not actually to destroy them.

Though the expenses of entering a port to repair a Particular Average, are Contributed for in England ; and in America, even the wages and provisions of the crew during the deviation, it has never been held that risks, incurred by such a deviation, are assumed by all the interests ; nor that, when they are different and greater than those incurred in the ordinary course of navigation for the voyage, a loss in consequence is to be Contributed for ; all the cases and writers, both American and foreign agree, that, to make a loss by stranding, a General Average loss, it must have been voluntary, or the immediate effect of a resolution to effect that object.

M. *Cauvet* in his *Traite sur les Assurances Maritimes*, says the practice in FRANCE is not to allow in General Average, the damage to a ship by accidental stranding in entering a port of refuge.

Loss or damage—voluntarily—to the property of others for the general benefit. e. g. If the crew of one vessel be obliged to cut the cable of another to preserve their own ship and cargo.

UNITED STATES.—It has been held that the right to Contribution, strictly so called, does not extend beyond those who voluntarily embark in a common adventure ; and that if A's vessel be about to come in collision with B's, which is at anchor, and B cut his cable and thus avoid it, he has no claim for Contribution against A for the loss of the cable and anchor. *The John Perkins*, U. S. C. C. Mass. 1857. 21 Law Reporter, 87–97.

But if the crew, for the safety of their own ship and cargo, cut the cable of another ship, the loss ought to be made good by a General Average on the ship and cargo, for the safety of which the damage was done.

ENGLAND.—Mr. *Arnould* (898) says : “ If with a view to the general safety of ship and cargo, it become necessary to damage and destroy another ship, or any part thereof, the loss thereby must, it seems, be made good by a General Average Contribution.” And he cites the case put by *Casaregis* (Disc. 46. n. 45. 63) viz : “ If a number of ships be lashed together, and one take fire, and the crews of the others unite in scuttling the burning ship for the safety of the rest, the loss of the ship so sunk, must be Contributed for by those saved.

LOSS ON FREIGHT.

By Jettison of Cargo.

The owner's freight being, so to speak, contained in the goods, shares the fate of the merchandise, and is jettisoned with the goods thrown overboard. The lost freight is, therefore, also recoverable in General Average Contribution. This rule is *universal*.

By Voluntary Stranding.

In those countries where the loss of the ship by voluntary stranding is Contributed for, the freight lost is also Contributed for. As we have already stated in what countries damage to or loss of ship by voluntary stranding is Contributed for, it is unnecessary to repeat it here.

LOSS OR DAMAGE TO CARGO.

Loss of Cargo in discharging when a vessel is at a port of refuge.

UNITED STATES.—If it be necessary, for the general benefit, to take out and store the cargo until the ship is repaired, and then return it, the whole expense of this is General Average, and if the goods be damaged in

consequence of such removal, they are Contributed for.

But an internal decay of the goods in port should in no case belong to General Average, being alone to be ascribed to the quality of the goods, which ought never to prejudice the rest of the shippers or the ship-owner. The trade in perishable commodities is, by its nature, exposed to greater hazards than that in other goods, and the occasional losses to which such articles are subject, from internal decay, must be counterbalanced by the extraordinary profits which they sometimes yield, owing to the very circumstance of their being perishable. A tacit agreement cannot be supposed to subsist between the shippers of goods not perishable, and those of perishable goods, by which the latter could be justified in demanding from the former an indemnity for the decay of their goods occasioned by any detention whatever; for such an agreement would be decidedly to the disadvantage of the former, because they would run a part of the risk on the perishable goods, without ever having any share in the profits. Owners and merchants suffer already too much by the practice of not attending to the distinction which should be made between goods liable and goods not liable to decay, in the adjustment of such external damage as belongs to General Average, for instance, that occurring on a jettison; and of considering, and allowing for, that part of the loss which ought in reality to be ascribed to the quality of the goods, as if it were the consequence of a measure taken for the general benefit. With equal, nay perhaps greater propriety, might other losses arising from the detention, such as a

fall in the market, interest of money &c., be brought into General Average.

In *Shelton v Brig Mary*, U. S. D. C., Mass. 5 Law Reporter, 75, it was necessary to remove the cargo in order to repair the vessel, but the cargo was so much damaged that it was also necessary to unload it for its own preservation. While on shore, part was destroyed by fire. Held, under these circumstances, that no Contribution was due, as the owner could not be considered as having made a voluntary sacrifice, for the purpose of prosecuting the voyage.

In *Bond v the Superb*, 1 Wallace Jr., 355, it was held that the removal of part of a cargo of perishable fruit, in a port of necessity, for the purpose of repairs, which increased an incipient decay, and hastened a partial destruction of the fruit, did not give the owner of the cargo a claim for General Average.

IN ENGLAND—the practice is not to allow in General Average, the loss or damage to cargo, by a forced discharge at a port of refuge.

FRANCE.—Damage or deterioration to the cargo, caused by the unloading, when unloading is necessary to effect repairs, and repairs are made, is General Average. So the expense of storing and reloading the cargo, is General Average. But damage to or loss of goods in the storehouse in a port of refuge by water, or by fire, is not General Average, but falls on the proprietor.

“Our custom sanctioned by a decision of the Tribunal of Commerce of Marseilles,” says *M. Cauvet* (§372) “is to reduce the deficiency in quantity to be allowed, to

the mean proportion which the same kind of merchandise ordinarily suffers in landing, when there has been no circumstance to aggravate it. For the cereals and grains, this loss is estimated at two per cent. of the quantity loaded on board. Coopering and re-baling packages are allowed.

HOLLAND.—The loss or damage of the cargo, sustained by the discharge and loading into lighters or boats of the ship when in distress, on the reloading on board the vessel, is General Average. *Dutch Commercial Code*, §699.

Loss of Cargo by sales effected to pay General Average expenses at a port of refuge.

Where the repairs are General Average charges, the taking of the cargo by the master, and the application by him of the proceeds for the common benefit, is a forced loan on account of the owners of the vessel, freight and cargo, for which each subject is bound to contribute their respective proportion, in like manner as if the cargo had been jettisoned for the sake of the whole. 3 *Mason*, 255, 260; 2 *Metcalf*, 140, 144.

In the *Gratitudine*, 3 Rob. Adm., 240, 263 (which was a case of a master hypothecating his cargo to pay for necessary repairs), Lord *Stowell* said the books overflowed with authorities that the master might sell *part* of his cargo, and that a sale of a part was equivalent to the hypothecation of the whole, and was a fit subject for General Average. And Lord *Ellenborough*, in *Dobson*

v Wilson, 3 Camp. 480, 487, expressed his opinion that if a ship should be seized for the non-payment of the sound-dues, and it became necessary to sell a part of the cargo, in order to obtain her release, this might be the foundation of a claim for General Average. See also, *Richardson v Nourse*, 3 B. & Ald., 237; *The Constanca*, 4 Notes of Cases, 677. Mr. Justice *Story*, in the case of the ship *Packet*, 3 *Mason*, 255, 260, said: "In the case of the sale of a part of the cargo by the master for the necessities of the ship, the sale is in the nature of a compulsive loan for the benefit of all concerned, and to enable the ship to prosecute her voyage. It bears a considerable resemblance to the case of a jettison, for the owner is deprived of his property for the common good, and to him it must be immaterial whether the loss be by a sacrifice at sea, or on shore." See also, *Giles v Eagle Ins. Co.*, 2 Met. 140, 144, where the loss on the sale of a quantity of salt, which had been sold to pay the expenses incurred in getting off and repairing a vessel, which had been driven on shore in a gale, was compensated for in General Average. In the schooner *Leonidas*, Olcott, Adm, 12, 15, there is a *dictum* that where the master sells part of the cargo to supply the necessities of the ship, the owners would probably be entitled, in case the ship or owners could not satisfy their demand, to compel the other owners of the cargo to contribute according to their respective interests.

In *Shelton v brig Mary*, 6 Law Reporter, 75, specie was shipped from Boston to Porto Cabello to purchase a return cargo. The vessel was obliged to put into Anti-

gua, and while there the master, being destitute of funds, sold part of the specie for the purpose of making repairs, and the vessel proceeded to her port of destination, and thence to Boston. It was admitted that the specie should be paid for in General Average, and it was held, that the owners were entitled to interest on the same from the time when they would have had the benefit of it at Porto Cabello, if it had been carried forward.

Mr. *Arnould* (895) states the law of ENGLAND to be—

1. "That where goods are sold by the captain in order to raise funds for repairing Particular Average losses, or for defraying the ordinary expenses of navigation, the loss arising from their sale must be made good by the ship-owner alone, who must, in such case, pay the merchant the price which the goods would have fetched at their place of destination, deducting therefrom the freight which would have been due for their conveyance.—
2. Where, on the other hand, they are sold for the purpose of defraying expenses or repairing losses, which are themselves of the nature of General Average, the loss arising from their sale gives a claim to a General Average Contribution; the goods sold are considered as tho' they had been jettisoned, and are made good upon precisely the same principles of Contribution."

Loss or damage to cargo, by pouring water down to extinguish fire.

UNITED STATES.—General Average. *Nelson v Belmont*, 5 Duer, 310, 323. *Lee v Grinnell*, 5 Duer, 400.

Nimick v Holmes, 25, Penn State, 366

In ENGLAND.—Whatever damage the *cargo* may sustain by that course must be borne by the cargo, and the *ship* must bear by itself all injury done to it by the spoiling of furniture, stores, provisions, charts, books, instruments &c.

The practice in FRANCE is against the allowance of the damage in General Average.

In HOLLAND, BELGIUM, SWEDEN and NORWAY, this damage is admitted in General Average.

Loss or damage to cargo, by scuttling a ship to extinguish a fire.

In the UNITED STATES, this damage is made good by General Average Contribution. *Nelson v Belmont*, 5 Duer, 310. *Lee v Grinnell*, 5 Duer, 400. But in ENGLAND and FRANCE it is not allowed.

Loss of Interest on capital by detention at port of refuge.

So far as we are able to learn, this is a loss which is *nowhere* allowed in General Average.

EXPENSES.

Port of Refuge Expenses—Expenses of entering or quitting a Port of Distress, to refit, and of discharging and reloading Cargo there.

UNITED STATES,—When in consequence of stress of weather, the vessel has sprung a leak, or has suffered other damage in the course of the voyage, whether of a General or Particular Average nature, or the stowage of the cargo damaged by some unavoidable accident, or some other disaster has occurred and it become necessary to the safety of ship and cargo to deviate from the course of the voyage, and put into an intermediate port to avoid the impending peril, or to repair or refit the ship, in order to be able to resume the voyage in safety; the pilotage and towage in and out; the regular port-charges on entering and clearing; the cost of protest; consular and health officer's fees; survey of the ship to determine her condition on arrival; postage and telegraphic despatches, when not repairing; and the hire of extra men to pump the ship while the cargo is on board, are allowed in General Average.

If it be necessary to discharge the cargo, whether for the common safety or to repair the vessel, the expenses of unloading and reloading, including the wharfage or dockage of the ship or goods; the conveyance of the goods to a warehouse, and the storage and damage to the goods caused by the unloading; the expenses of cooping casks and mending packages injured by the discharge and reloading; the agency commission for the

custody and reshipment of cargo; and interest on money advanced for the common benefit; are General Average.

The board of underwriters of New York, believing that claims for contribution in General Average for deficiency, loss or damage to cargo, supposed or assumed to have been occasioned by discharge and reloading, or otherwise, have of late been frequently admitted into adjustments (as well as other claims) without positive or satisfactory proofs thereof. And that such practice is, in many instances, very unjust to underwriters, ship-owners, owners of cargo, and all uninsured parties, including those who, having some basis for them, make no such claims—appointed a committee, composed of members of the board, and referred the subject of claims on cargo allowed in General Average, to the said committee for their consideration. The result of the investigation and their report thereon, was the adoption of certain resolutions on the fifth December, 1866, and the distribution of the same in the shape of a circular, among the underwriters and adjusters of Averages in the United States, and elsewhere. The resolutions adopted are as follows: “The underwriters of this city, will insist that claims and sums allowed in General Average, shall be verified, and that no claims for loss, damage or deficiency of cargo, shall be allowed in General Average adjustments, unless proved by a sworn report of survey, held by competent and disinterested persons, at or near the time and place where such loss, damage or deficiency occurred, setting forth the cause and extent thereof; unless, in the absence of such evidence, such claims

shall be approved by the board of underwriters' 'Committee on Losses and Averages,' and supported by other proofs."

The expense of Wages and Provisions of the master and mariners, from the time the vessel bears away from the course of her voyage to go into the port of refuge, to the time the ship is again ready for sea, is General Average. The wages allowed are the wages agreed upon between the ship-owner and the master and mariners. Many large ships are sailed by the master at a nominal rate of wages and primage, or a percentage on the freight. The rule adopted by adjusters, in such cases, is to allow what the ordinary wages per month of a competent master would be for a vessel of a similar kind and class. The rule as to allowance for provisions is as follows : In New York, the master one dollar a day, the mates fifty cents each, the seamen each thirty cents ; in Boston, the master one dollar, the mates fifty cents, the seamen twenty-five ; in San Francisco, the master two dollars a day, the mates one dollar and a half, and the seamen thirty cents.

Commissions on disbursements, loss on exchange, bottomry premium, cost of bond, loss on sound cargo sold to pay expenses, are General or Particular Average, according to the nature of the case, and are apportioned in an adjustment of Average to each interest benefitted. If there be a profit on the sale of cargo, it belongs to the owner of the cargo.

When the cargo is discharged and in a place of safety, the expenses of repairing the ship, and the incidental expenses, such as surveys on the ship, discharging and

reloading ballast, towing her to the place of repairs and back to the place of reloading, dockage &c., are a Particular Average on the ship, unless the damage to be repaired is itself a General Average ; the cost of repairs follows the nature of the damage.

If, on a regular survey, the vessel be condemned and the voyage abandoned, the General Charges thenceforward cease, and the subsequent charges become special to the vessel or cargo, for whose benefit they were respectively incurred.

ENGLAND.—In England the following port of refuge expenses are admitted in General Average : the pilotage or towage in, harbor and light dues, quarantine and health dues, use of warps and tackle, getting the vessel into harbor and mooring her there, wharfage, custom-house entries, telegraphic despatches, the first survey held to determine the condition of the vessel and what ought to be done, the expenses of discharging the vessel and putting the cargo in a warehouse, when such discharge is necessary to repair the vessel, to cool the cargo or restow it when shifted by peril of the sea, the expense of noting and drawing the master's protest.

The cargo being separated from the vessel and put in a place of safety, the General Average expenses cease, and the rent of the warehouse, insurance on the cargo against fire, surveys upon the cargo, drying, repacking and coopering, are a Particular Average on the goods.

The expenses of conveying back the goods from the warehouse to the shipping place, the wharfage and quay dues, the lighterage on board, the labor of reloading, stevedores, restoring metage at reshipment, use of screws

for cotton cargoes, pilotage out of harbor, boats and men assisting towage out, are Particular Average to the freight.

The ship is charged with the expenses of surveys held subsequent to the first and its repairs, except the repairs of damages; which are themselves a General Average.

The Agent's commissions on money advanced, bottomry premium, and loss on the sale of cargo to pay expenses, are applied as a percentage to all the columns of disbursements, *i. e.* are either Particular or General Average, according to the nature of the loss or expenses. The Agent's travelling and other small expenses usually belong to General Average. He very commonly makes a charge for his trouble and attendance, his general supervision of the business, correspondence &c. ; This is most frequently charged to General Average in one sum. *Hopkins*, 45-47; *Baily*. 179-80; *Report of Hon. Wm. Marvin*, 33.

The wages and provisions of the crew are not regarded as an Average, either General or Particular, but are to be paid by the ship-owner as an ordinary expense of navigation. Mr. *Hopkins* (p. 52) says: "We reject this expense on the ground that an owner is bound by law to keep his vessel manned until she has completed her voyage, and that therefore he has not the option of dismissing the crew. All that can be said is that the protraction of the voyage is an unfortunate circumstance for the owner, but that he has not a remedy; that protraction may be equally unfortunate for the proprietor of the

cargo, whose goods, if perishable, may be much depreciated by the delay; and they may lose their market from the same cause. Foreigners and some of our own colonists do not see the subject in the same light, however, and claim the wages and victuals in their adjustments. Many of our own insurance clubs have followed their example, and permit by their rules the wages of ships under detention to be allowed in the Average, and they even arrange a scale *per diem* to remunerate the owner whose ship is detained. Although a vessel be unfortunately detained in some port all the winter, ice-bound, the owner has no remedy against the underwriters, and still less claim for contribution from the co-adventurers, since there is no voluntary sacrifice on his part, but an inevitable necessity. The only question that can arise in the case is, whether this position be altered by a ship being ice-bound in a port where she has been obliged to put in by circumstances which make her expenses going there, General Average. The answer is in the negative; for neither by our law or custom does detention, with the one or two exceptions I have mentioned, give any claim by which the owner can shift the burden on to others."

Lord *Tenterden* suggests, that whenever a vessel puts away for the purpose of repairing damages which are themselves the subject of General Average, the wages and provisions should be allowed as an accessory. *Abbott* on Shipping, chap. 10, sec. 5, 497.

Marshall, an approved English authority, writing in 1802, cites from *Beawes* the following rule: "Where a

ship is forced to enter a port to repair the damages she has suffered in a storm, being unable to continue her voyage without apparent risk of being lost, the wages and provisions for the crew from the day it was resolved to seek a port to refit the vessel, to the day of her departure from thence, shall be brought into General Average.

This rule thus approved in England, is now and always has been, the foundation of the American practice ; English courts of law have invaded it, and the “ custom at Lloyd’s,” as we have seen, is to ignore it.

FRANCE.—M. *Cauvet*, in his *Traite sur les Assurances Maritimes*, states the practice in France as follows:—“ If, in order to avoid capture, a tempest, sinking or other peril to ship and cargo, the master, after due consultation with the crew, deviate from the course of the voyage and go into a port of refuge for the common safety of ship and cargo, the port dues, pilotage and other expenses of entering and leaving the port, the expense of unloading the cargo when a leak in the ship endangers the cargo, and such unloading be necessary to stop the leak, and the leak be stopped and the voyage resumed, including damage or deterioration to the cargo caused by the unloading, and the expense of storing and reloading the cargo, are General Average. If the leak be insufficient to endanger the cargo, the unloading should be deferred ; and if the captain unload the cargo in such case, he should pay the expense, because he might have avoided it. In general, however, the recommendation of surveyors or experts, properly appointed, will protect the

captain. The expense of repairing the ship is General or Particular Average according as the damage or injury repaired is General or Particular. The Wages and Provisions of the crew during the detention are, in practice, regarded as Particular Average, whatever may be the cause of putting into port, or whether the ship be freighted by the voyage or by the month. The expense of going into port on account of a want of provisions, and the expense of coming out, is a Particular Average to the ship, such want being the master's fault, or the effect of a fortuitous accident occurring to him in the fulfilment of his contract to carry. The cost of surveys of ship or cargo is apportioned or divided according to the character of the subject surveyed or the damage. The cost of surveys of Particular Average to the ship is Particular, of General Average, General, being accessorial to the nature of the original cause of the survey. So also of the cargo, and of the orders of consuls and copies of them, and of the report of surveyors. The cost of the master's protest is General Average when the expense of going into the port is so, or when it verifies damages or expenditures classified as General Average. Interest, commissions on money advanced, the premium on borrowing money on bottomry or respondentia and the cost of borrowing are added to the principal of each Average in the proportion that it bears to the total expenditure."

"Damage to or loss of goods in the storehouse in a port of refuge by water or by fire is not General Average, but falls on the proprietor. In like manner, dam-

age to a ship by accidental stranding in entering a port of refuge is not General Average."

"Freight paid to another vessel for carrying on a part of the cargo from the port of refuge which the ship is unable to re-stow or carry, is General Average."

"When a ship is condemned in a port of refuge as incapable or unworthy of repairs, expenses are incurred for keeping and selling the ship, and for unloading, storing and reloading the cargo upon another vessel. These expenses are not General Average, but are at the charge of each proprietor of the thing which necessitates them. They are ordinarily paid by a loan on a respondentia bond upon the cargo, or by the proceeds of the sale of the ship or of the damaged merchandise. Hence the necessity of an adjustment of the account between him who has paid the loan and taken up the bond, or whose ship or goods have been sold. This account is adjusted by a classification of the Averages and expenses between the ship and the cargo according to the causes which produced them. In like manner, in a case of shipwreck, there are expenses incurred on account of the ship and on account of the cargo. These are adjusted in the same manner as in a case of the condemnation of the ship. The adjustment becomes complicated when the cargo comprehends different kinds of goods belonging to different proprietors. A condition of things then arises requiring the recognition of several classes of expenses. In the first class are the General expenses to be apportioned between the ship and cargo; in the second, expenses concerning the cargo as a totality; and then the expenses incurred on account of each species of merchandise.

These classes of expenses established, it is necessary to apportion between the ship and cargo the general expenses, and between the different species of goods the expenses relating to the cargo. When the adjuster can, he determines what expenses have been incurred on account of the ship, and what on account of the cargo. But this, in many instances, is extremely difficult, on account of a want of definite information; as, for instance, where money is expended for paying laborers employed in saving and transporting ship's materials and cargo indiscriminately, expenses of correspondence &c. In such cases the expense is apportioned according to the values saved at the place of saving; and if this cannot be ascertained, then at the place of destination, deducting the freight and landing charges and a certain profit, in order to approximate as near as possible to the values at the port of refuge or place of shipwreck and saving. The expenses incurred by the cargo as a totality are divided between the different kind of goods, partly in proportion to volume and weight, and partly in proportion to their respective values. The cost of labor, cartage &c., is divided upon the goods saved according to volume and weight, and the commissions &c. paid according to values."

SPAIN.—The Spanish law proceeds on the principle that the *first or real cause* of expenses is responsible for *all* the consequences.

According to the Spanish Commercial code, if a ship put into an intermediate port, owing to a leak proceeding from inherent defect, the owner is chargeable with every expense until she have resumed her voyage. If

she go there from a necessity which we call Particular Average, the underwriters on ship pay the whole expenses. If the forced deviation arise from the state of the cargo, on the cargo all the expenses are thrown. If the cause of putting into port be one in itself of General Average, then all the disbursements and the repairs are claimable as General Average.

BELGIUM.—The Commercial Code of Belgium is the same as that of France. Antwerp, however, has built up a custom of her own, which differs in some particulars from any which have prevailed in France. It is more like the custom in England, but not the same.

By the custom of Antwerp, the community of interest between the ship and cargo is considered as interrupted from the moment the cargo (if it be necessary to unload it) is separated from the ship, or from lighters in order to be landed. This community of interest is restored from the moment the cargo is put on board the original ship, or on board lighters to be transported there. Consequently, the expenses of going into port, of coming out, the hire of laborers employed to pump the ship as long as the cargo is on board, judicial expenses, fees of consuls and notaries and the commissions of agency, are General Average. Commission s for the advance of funds, bottomry premium, interest and loss upon goods sold to procure funds, are divided *pro rata*, between the different classes of Average according to their respective amounts.

The cargo is charged with the expenses of landing and conveying to the warehouse, the storage, surveys on it, and the expenses of putting the cargo on board again,

or on board lighters to be carried to the ship.

The Wages and Provisions of the crew are rejected from General Average. If the freight be insured, they are considered as a Particular Average on the freight, and are paid by the underwriters on freight, as in France. It is in the case only of a landing of the entire cargo that the expenses of landing, storing and reshipping the cargo are rejected from General Average. When there is a landing of part only, as in order to take out a broken mast and put in a new one, the expenses of the landing, storing and reshipping such part are allowed in General Average. *Antwerp Customs, by Messrs. Engles and Van Pebourgh. Judge Marvin's Report, 42.*

HOLLAND.—The code of Holland declares, that the pilotage or other expenses of entering and departing from a port of refuge, the expenses of unloading the vessel, the hire of warehouses and depots in which the merchandise is deposited which cannot remain in the vessel during the refitting, the wages and food of the crew during the time the vessel is constrained to remain in port, the marine premium on money borrowed on bottomry to pay General Average expenses, or the premium to insure such expenses, the loss, by a sale, of part of the cargo to pay General Average expenses, and the expenses of adjusting or stating the General Averages, are all General Average.

GERMANY.—The new code lately adopted by the German States and the free towns of Lubeck, Hamburg and Bremen, reads as follows :

“ If the vessel have put into a port of refuge in order to

avoid a common danger threatening the ship and cargo, in case the voyage were prosecuted, more particularly if the putting into port be in order to repair damage done to the ship during the voyage."

"To General Average belong, in this case, the expenses of entering and leaving, the expenses to the ship itself during the stay, the wages and provisions of the crew during the stay, also, the expense of lodging the crew on shore for and as long as they could not remain on board; further, if the cargo must be discharged as a consequence of the cause which led to the ship putting into a port of refuge, the expense of discharging and unshipping, and the expense of warehousing the cargo on shore up to the time when it might have been put on board again. The several charges for detention are taken only for the time the cause of putting into the port of refuge remains in force. If the cause be found in a necessary repair of the ship, the charges for detention are only taken for as long a time as that in which the repairs might have been completed."

SWEDEN.—The Swedish Maritime Code of Feb'ry. 23, 1865, declares the following to be General Average :

"*The Expenses.*—When in order to avoid a danger which, during the continuation of the voyage, threatens equally the vessel and the cargo, the vessel enters a port of refuge. In these expenses are enumerated, the cost of engaging outside assistance for bringing the vessel into and out of such port of refuge, pilotage, light house, harbor or any other dues; damages done to the vessel, in order to discharge the cargo; expenses for discharging

cargo; the storing, reshipping and stowing of the same, when the goods must be discharged in order to bring the vessel into port, or in order to repair the same; the support of the crew while the vessel remains in such port of refuge."

"The expense of the stay of the vessel is computed only for the time the cause of the vessel's entering a port of refuge still exists. If the said cause consist in the necessity of repairing the vessel, then the expenses are computed only for the time in which the necessary repairs could have been completed. The cost of repairing the vessel is then allowed in General Average only when the damage itself is such. When the voyage terminates in the port of refuge, then are considered as General Average, only the expenses of bringing the vessel into the port, and the support of the crew until it became settled that the voyage should terminate in said port of refuge."

"Expense and loss while in such port of refuge in obtaining funds necessary to be expended for the mutual benefit by vessel, freight and cargo, or in order to pay such expenses as will be included in General Average, as, for instance, loss occasioned by reason of the difference in price obtained for a part of the cargo which must be sold in order to obtain funds. The premium for bottomry bond, when such must be given, in order to procure the money necessary to be expended on mutual account. Expenses of issuing bills of exchange, insurance and lawful interest, when the means are obtained in any other way."

NORWAY.—The Norwegian Maritime Code of March

24,1860, declares, that in the expenses in a port of refuge included as General Average are :

a. Pilotage, harbor and other public dues that accrue to the vessel or cargo, but not the duty on goods that are sold in a port of refuge or to remain there.

b. Expense in discharging, warehousing and reshipping the cargo, but not the money paid laborers for moving the cargo while in the storehouse, or any other arrangement for the preservation of the same, nor the premium for insuring against fire while the cargo is on storage.

c. Commissions paid to agents, so far as they are not considered as including charges for making arrangements for, or superintending the preservation of the cargo.

d. Wages and support of master and crew, which are calculated for the time during which the vessel necessarily must remain, in order to have the damage repaired.

If the preservation of cargo made it necessary to seek a port of refuge, then the expenses mentioned in *a.* and *d.* are considered as General Average, but not those mentioned in *b.* and *c.*

If the vessel, after entering a port of refuge, be found unfit to continue the voyage, or if the voyage for any other cause terminate in such port of refuge, then the expenses mentioned in articles *b.* and *c.* cannot be included in the General Average ; the expenses mentioned under letter *a.* only so far as concerns the entering of the vessel, and the expenses under letter *d.* only for the time during which the vessel was obliged to remain, before it

was decided that the voyage should terminate there.

The expenses are not taken into General Average when the vessel enters a port of refuge in order to escape from an enemy, or by reason of contrary winds, ice, want of provisions or other similar cause.

DENMARK.—Expenses for ship and cargo, in consequence of an intermediate detention at a port of refuge, say harbor dues, labor in discharging and reloading cargo, warehouse rent for the cargo, ordinary wages and provisions for the captain and crew, and pilotage are allowed in General Average. *Judge Marvin's Rep.* 43.

CUBA.—As General Average are liquidated all expenses of in and outward pilotage, port dues, expenses of discharging, storing and reshipping the cargo, and all other extraordinary disbursements, including wages and maintenance of the crew during the term of the necessary detention in an intermediate port.

If the cause of the entrance into port be a leak or other accidental damage to the vessel, disabling her to continue the voyage, the expenses of repairs and refitting are distributed in the following proportion; two thirds as Simple or Particular Average, *i. e.*, for account of insurers of the vessel, and the other third to be borne by the owner, as a compensation for the apparel worn out and replaced by other new ones, which have improved the condition of the vessel in every respect.

If the entrance into port to repair damages be caused by the consequent and deliberate acts for the general benefit, such as cutting away a mast in a tempest, losing rigging and sails, or throwing overboard part of the cargo

or ship's apparel to relieve her, all the *expenses in port* are liquidated as General Average; of those for refitting the vessel and replacing apparel sacrificed, two thirds are charged to the General Average, leaving the remaining third to be borne by the vessel's owner for the same considerations explained in the foregoing case. The portions of the cargo thrown overboard, at their invoice cost, with, moreover, the freight of the same due to the vessel, are entirely charged to General Average. Regarding anchors and chains, it is not customary in Cuba to make deductions for wear, but their entire value is indemnified. *Judge Marvin's R.* 48.

Disbursements made for the common benefit, whether they must be reimbursed in General Average, when ship and cargo wholly perish before arriving at the port of destination.

UNITED STATES.—The rule is well established, that disbursements made for the common benefit, must be reimbursed in General Average, whether the ship and cargo be eventually saved or not. *Spafford v. Dodge*, 14 *Mass.*, 66.

In considering questions of this nature, we recognise the existence of two classes of General Average, viz:—*Sacrifice* for the general safety, and *Expenditures* for the common benefit, the former termed by some writers *Restitution*, the latter *Recompense*—Whenever a claim for *restitution* of property sacrificed (*e. g.* jettisoned), and it

turns out that nothing is saved from the adventure, because after perils destroy the value at risk, no Contribution is due, the legal presumption being that the thing sacrificed, if it had remained on board would have perished.

But the rule in respect to *Expenditures* is different. If money be advanced to meet expenses at a port of necessity by the ship owner (unless raised on bottomry), such advance establishes a valid claim against the proprietors of goods at risk, which claim survives the subsequent loss of the vessel and cargo, and a personal action may be maintained against the said proprietors therefor.

If the ship and cargo perish utterly, an adjustment must be made with reference to the values existing at the time the expenditures were made. *Douglass v. Moody*, 9 Mass. B. 548.

ENGLAND.—Mr. *Arnould* (921) thus states the law and practice in England: “When an *expenditure* is incurred for the general benefit, the money by which it is discharged is either supplied by the ship-owner out of his own funds, or raised by a loan from some third party; in either case it is obvious that he has a personal and absolute claim against all the parties interested in the adventure, in respect of the money thus laid out for their benefit, and that from the moment the advance has been made, it is equally obvious, on the true principle of adjustment, that they are bound in equity to liquidate this claim in full, whether any part of the property, for whose benefit the outlay was made, be ultimately saved or not. Were this not so, the object to be had in view in every

adjustment of General Average, would not, under all circumstances, be attained, for in those cases where the ship and goods, after being relieved by the expenditure, wholly perish before arriving at the port of destination, the party making the advance would, if no contribution were to be made, be worse off than the parties for whose benefit it was incurred, as he would not only have lost, like the rest, all his share in the adventure, but moreover would remain burdened with a debt contracted on their account, or be the loser of a sum of money laid out for their safety.

Hence the long established rule is, that *disbursements for the general benefit must be fully reimbursed in General Average, whether the ship and cargo be eventually saved or not.*"

"Where, however, some integral part of the adventure itself has been sacrificed for the safety of the rest, as in cases of jettison and other sacrifices of like nature, the rule of adjustment is different.

The principle, indeed, is still the same, viz ; that the owner of the property sacrificed should be placed in the same condition, by the result of the adjustment, in which he would have stood if, not his property, but that of some other party to the adventure, had been sacrificed ; he must not be worse off than if his goods, instead of being jettisoned, had remained on board.

The practical rule adopted to attain this end, is as follows : The property sacrificed for the general benefit is regarded as though it had never been lost, but actually constituted a portion of the whole mass of property upon

which the Contribution is assessed, at the time the adjustment is made ; its supposed value, like the actual value of the property saved, is fixed at a certain amount, and in proportion to that amount, it takes its full share with the rest of the adventure, for whose benefit it was sacrificed, in contributing to the loss thereby incurred.

Thus, to take a very simple instance, suppose property, the value of which, *if* saved, would have been 100*l.*, to have been sacrificed for property the value of which, *as* saved, is 900*l.* The whole sum upon which the Contribution is to be levied will be the aggregate value of the property sacrificed and that saved, viz : 1000*l.* ; the amount to be made good being 100*l.*, or the tenth part of 1000*l.* ; the property saved contributes a tenth, or 90*l.* and the property sacrificed also a tenth, or 10*l.*, making together the whole amount lost 100*l.*

It is clear that this is the only equitable way in which this kind of loss can be adjusted, for if the property sacrificed did not contribute like the rest, the owner of such property, receiving its total value, would be better off than the rest of the co-adventurers, and would not be in the same condition in which he would have been, if their property had been sacrificed instead of his.

It is also clear, that where, after the sacrifice, the whole of the rest of the adventure utterly perishes, no Contribution can be due, for in such case, even if the property had not been sacrificed, there is no reason to suppose that it would not have perished like the rest ; its owner is in no worse position than he would have been in had

it been made by some one else on board, and not by himself. The condition of all the co-adventurers is precisely equal; all is lost; there is nothing to contribute *from*, and nothing to contribute *for*. Hence, the rule with regard to sacrifices for the general benefit, is, that they are not contributed for, where nothing is saved."

In FRANCE and every other country, we believe the rule is the same as in the United States and England, viz : that *disbursements* paid for the common benefit, must be reimbursed in General Average, though the ship and cargo wholly perish.

Where, to meet disbursements for the common benefit, money has been raised upon bottomry and therefore contingent upon the ultimate safety of the vessel.

It is EVERYWHERE admitted, that, in case of funds to meet expenditures being raised merely by hypothecation, the claim for Contribution for the expenditures becomes subject to the same conditions as a claim for Contribution for jettison ; it depends upon the property's being finally saved.

One reason for this practice is, that the party whose property has been hypothecated has lost nothing since the bond of hypothecation has not been enforced. Another reason is, that the lender in consideration of the marine interest, takes the risk of the arrival of the property to the amount lent, for which all the parties

concerned engaged to pay him a premium, in case of the arrival of the property, since, in that case they must contribute the amount of the marine interest. But, upon these reasons, if a part of the ship or goods hypothecated be finally saved, and go in part satisfaction of the bond, the owner of what is saved would be entitled to Contribution for the amount saved, and thus appropriated towards the discharge of the bond.

Expenses of delay at the termination of the adventure.

This is NOWHERE regarded as General Average. A ship being detained at Liverpool, her port of destination, after the cargo was delivered, to repair damage sustained before it was unloaded, Mr. Chief Justice *Thompson*, of New York, said: "The expenses during the time the vessel was detained at Liverpool cannot be brought into General Average. They were not incurred for the benefit of cargo or freight. The cargo had been delivered, and the freight earned, before the expenses in question were incurred." *Dunham v. Commercial Ins. Co.* 11 Johns, 315.

Expenses of delay when frozen up in a port of refuge.

UNITED STATES.—Delay by the vessel's being frozen up in the regular course of the voyage is not a case of Gene-

ral Average. But if a vessel be frozen up in a port where the master put in voluntarily to repair, the expenses of detention during the time of her being frozen up are a part of the General Average.

ENGLAND.—Mr. *Arnould* (p. 918) says: "Where a ship, has, for the general safety, put into a port of distress to repair, and while there is frozen up for the winter, the increased expense of wages and provisions occasioned by this delay, is allowed to be General Average in America; but it is apprehended that it would be so considered in England only when the loss, which the ship went in to repair, was itself of the nature of General Average."

Mr. *Hopkins* (53) does not agree with Mr. *Arnould* that if the circumstances which made the vessel to enter a port of refuge were General Average, the expense of her being ice-bound in that port would be General Average. He says, this is not General Average, for, neither by English law or custom, does detention give any claim by which the owner can shift his burden on to others.

Mr. *Benecke* proposes the same exception as Mr. *Arnould*, viz: that "when a vessel is long detained by natural obstacles in a port which she entered in distress, it then appears that the question whether her crew's wages are to be General Average, can only depend on the cause of her entering the port being the subject either of a General or Particular Average."

Mr. *Hopkins* dissents from this. He says "the exception which Mr. *Benecke* proposes seems to me a distinction without a difference."

Expense of being frozen up in the ordinary course of the voyage.

This is not General Average ANYWHERE. It is a delay sustained in the ordinary course of events, and not in consequence of any misfortune. The owner of the goods suffers from it in being deprived of his capital, perhaps, also, by the deterioration of his goods, and the fall of the market; and the ship-owner likewise suffers by the wear and tear of the ship, and the augmented expenses of the voyage.

Mr. *Arnould* (p. 918) says: "If a ship be frozen up in any port at which she may happen to be, in the ordinary course of the voyage, or when, being unable to enter a river or harbor on account of floating ice, she is compelled to put into a harbor and winter there, the expense of paying and provisioning the crew during this detention, gives no claim to General Average Contribution."

Expense of quarantine on usual course of the voyage, whether of a usual or unusual length of time.

The regular quarantine charges, invariably attached to certain voyages, cannot be considered as General Average, since the captain, in fixing his freight, must calculate upon them. Neither can the charges arising from quarantine instituted under particular emergencies be viewed as voluntary sacrifices for the benefit of the whole.

Goods or money paid as ransom to Pirates or to a public enemy for the whole interest.

UNITED STATES.—If a ransom be paid in good faith, for the benefit of all concerned, to a captor, whether piratical or belligerent, it is clearly a case of General Average. *Douglas v. Moody*, 9 Mass., 548; *Sanson v. Ball*, 4 Dall., 459.

Mr. *Phillips* in his Treatise on Insurance, vol. 2, §1336, says: "It was formerly the practice to ransom vessels captured by the public enemy, and to give hostages as security for the payment of the ransom, in which case the amount of the ransom, as well as the expenses of the hostage during his detention, were settled by General Contribution. (*Emer. tome 1*, p. 474. 629. 630; *Lopez v. Winter*, Postlethw, Dict. tr't Average.) But more recently, laws have been enacted prohibiting compositions with a public enemy. (22 Geo. III, c. 35; 35 Geo. III, c. 66, s. 37–39), and such compositions have been considered illegal, though not prohibited by specific laws." For this last proposition no authority is cited by the learned author, and Mr. *Parsons* (Mar. law, p. 299, vol. 2) says he is "inclined to doubt whether it be correct on principle or on authority." Every writer on international law speaks of ransom between belligerents as undoubtedly unlawful, except when it is prohibited by statute. Mr. Justice *Story*, in *Maisonnaire v. Keating*, 2 Gallis. 325. 338, said: "The very law of war prohibits all commercial intercourse, and suspends all existing contracts, between enemies; and the case of ran-

soms is almost the only exception, which has been admitted, from the general rule." *Girard v. Ware*, Pet. C. C., 142, was a suit brought by the respondents, the libellants in the court below, for wages. The ship of the appellant, to which they belonged, was captured by the British within the Capes of Delaware. She was afterwards ransomed by the owner and brought to Philadelphia. Held, that the appellees were entitled to full wages, subject to a contribution on account of the ransom. In *Maisonnaire v. Keating*, 2 Gallis, 325, it was argued that a contract for a ransom made between a belligerent and a neutral, immediately after capture, was illegal, because every ransom supposed a vested right in the captors, and that this did not exist in respect to neutrals, on the ground that the captors had only a right to bring in for adjudication, and that neutral property was liable to condemnation only in case of delinquency, but it was held, by Mr. Justice *Story*, that the right to take a ransom was not founded in a vested title, nor was it, strictly speaking, a repurchase of the captured property, but a relinquishment of all the interest and benefit, which the captors might acquire or consummate in the property by the regular adjudications of a prize tribunal, and that therefore, the right to take a ransom existed from the moment of the capture. See also, *Welles v. Gray*, 10 Mass., 42; *Clarkson v. Phœnix Ins. Co.*, 9 Johns, 1.

If, therefore, a ransom be made for the benefit of all concerned, it is clearly a case of General Average.

ENGLAND.—If a merchant vessel be captured by a pub-

lic enemy, it is not allowed, for national considerations, to ransom her ; consequently, a sum of money paid for the ransom of the whole co-adventure could not be recovered from the several parties, as General Average in a court of law or equity. But the same consideration does not apply to a pirate or private marauder ; and, therefore, money given to the captor by the way of composition to effect the release of the vessel and her cargo, is properly claimable by General Contribution.

The statute 45, George. III. prohibits ransom to an enemy ; and under this statute it has been held that if a master ransom his ship and bring her home, the owner may take her from him without repaying what he expended, nor would the owner be obliged to repay money which was borrowed for the purpose. *Parsons v. Scott*, 2 Taunt, 363. And the master would not be liable for the debt to the lender. *Webb v. Brooke*, 3 Taunt, 6.

Mr. *Arnould*, (917) says : Ransom to an enemy is now prohibited in this country by positive law ; but this extends to enemies only, and not to pirates or other plunderers ; and it appears certain, that any money paid to them by the captain, in order to induce them to liberate the ship and the rest of the cargo, would be General Average ”

“ It is quite clear, also, that a compromise between neutrals and belligerents is lawful, and that the amount paid by way of carrying it gives a claim to Contribution.”

FRANCE.—Things given voluntarily by way of compo-

sition for the ransom of vessel and cargo from captors or from pirates, is General Average; but when the enemy or pirate chooses himself to take at his own discretion, certain things, leaving the ship thereupon to depart, the loss is a Particular Average, and falls on the proprietor of the thing so taken. *Traite sur les Assurances Maritimes*, by M. Cauvet.

HOLLAND.—The Dutch Commercial Code, sec. 699, art. 1st, declares “Whatever is given to the enemy or pirates for the surrender or the ransom of the vessel and cargo, is General Average. In doubtful cases it shall be considered that the ransom was for the vessel and the cargo conjointly.”

GERMANY.—When the vessel has been detained by enemies or pirates, and is redeemed by payment. What is paid for redemption, together with the maintenance and ransom of the hostages, is General Average. *General German Mercantile Law*, part 8, §708.

SWEDEN.—The Swedish Maritime Code of 1865 declares, among the principal compensations to be made through General Average: “Damage done to the vessel or goods during the defence against enemies, pirates or corsairs, and the ransom paid for the redemption or release of the ship and goods, or the ransom paid for any one of the crew, who, while in the service of the vessel, has been carried away by violence or given as hostage; also, the expenses for the support, medicines and rewards for any one, who, during the combat was wounded; for the burial of one that may have been killed, and for a donation to his widow and children. The last named

expense shall also be allowed for one who, while in the service of the vessel in distress, through his work at such time, is hurt or killed."

ANTWERP.—Things given in composition, sums paid, or ransom bond given to privateers or pirates in order to ransom the ship and cargo, are considered as General Average. But it is necessary that it should be proved that the composition or ransom took place really for the redemption of the ship and cargo *conjointly*; for if the privateer or pirate had in view the capture of the ship alone, or the cargo alone, the redemption or re-purchase would not be a General Average act; but the ship alone, or the merchandise alone, must support the consequences of the composition or redemption effected in its exclusive interest. *Customs of Antwerp, by Edward Van Peborgh, Despacheur, and Theodore C. Engles, Underwriter of Antwerp, printed for the benefit of the International Average Committee.*

Expenses of delay and making claim for vessel and cargo in case of capture.

UNITED STATES.—General Average. *Speyer v. New York Ins. Co.*, 3 Johns, 88; *Jumel v. Marine Ins. Co.* 7 Johns, 412; *Kingston v. Girard*, 4 Dall., 274; *Dorr v. Union Ins. Co.*, 8 Mass. R. 494.

ENGLAND.—Although by English custom the wages of the master and crew are not generally chargeable in General Average, there is one case in which they are

rightly admitted, and that is, when a ship having been captured or detained in a foreign port, it is necessary for the master and some members of the crew to remain with her for the purpose of making and substantiating a claim for her restitution, together with the release of her cargo. But if the ship be only detained under an embargo, the wages are not allowed, and remain at the owner's charge. *Hopkins*, 49.

FRANCE.—Expenses incurred in good faith to obtain the restitution of a captured ship and cargo, when it is obtained, and the wages and expenses of the crew who remain on board to guard and reclaim the same, are General Average. *Emerigon*, tom. 1, p. 631. *Code de Commerce*, 1, 2, tit. 11 a. 211 n. 6.

HOLLAND.—The expenses of claiming the ship and cargo seized or captured, when both are claimed together by the master, are General Average. *Dutch Commercial Code*, sec. 699, art. 12.

Salvage in case of Capture.

The expense of the salvage allowed for recovering property captured is contributed for in General Average, where different parties and interests are concerned, upon the principle on which that of claiming captured property is entitled. *Williams v. Suffolk Ins. Co.*, 3 Sumner's R., 270 and 510; *Heylyger v. N. Y. Firemen's Ins. Co.*, 11 Johns, 85.

Expense of remunerating Salvage services rendered for the common safety, in case of shipwreck.

UNITED STATES.—There are some losses or expenses which are always settled in the same way as a General Average loss, and are usually called by that name for convenience, although they do not fall precisely within any definition of it. Salvage is the principal one of these. This word has two meanings. It is sometimes used to indicate what is saved from a wreck ; but in this sense we do not refer to it now. The word more frequently means the amount that is paid to those who save maritime property which is endangered or abandoned ; and such persons are called, in maritime law, salvors. This amount is usually decreed in admiralty in the form of a percentage on all the property saved. Sometimes, however, it is a gross sum given to the salvors. In either case it is settled in the same manner as a General Average claim, and usually under that name.

The underwriters generally prefer to have a claim for salvage settled by the United States Court. Of all the modes of settling a demand for salvage, an arbitration is usually the most injudicious for the master to adopt. He is very liable to be imposed upon, however cautious he may be, as he can scarcely ever know anything of the qualifications of the arbitrators. Besides, however intelligent or honest they may be, there is usually a spirit prevalent, in neighborhoods where shipwrecks often occur, which the French call an *esprit de localite*, which warps the judgments of the most candid and upright

men engaged in business, and renders their awards partial and unjust.

When a ship and cargo are saved together, as, by lightening the ship, carrying out anchors &c., the total salvage is apportioned upon the ship and cargo, according to their respective values. But when the ship is wrecked and lost, the interests are thereby dissociated, in as much as the different articles of the cargo are likely to belong to different owners, each separate article of the cargo saved ought, as near as may be, to bear its own expense of saving, so that dry cotton belonging to one owner shall not pay for saving wet cotton belonging to another, nor silks pay for saving rail road iron. Articles, however, of the same kind, saved at the same time, by the same salvors, in a similar condition, may generally be charged with the same rate of salvage. So, too, in such cases, the wharfage, storage, labor bills in landing and storing the goods saved, ought, as near as may be, to be charged to the separate article saved, so that goods of great value and little bulk shall not be made to pay the expenses on goods more bulky and less valuable. Expenses of sale should be charged to the goods sold. In such case, however, the notary's fee for noting and extending the master's protest, cost of documents useful to all the parties interested, and the costs of salvage suit, instituted by all the salvors conjoined, against all the property saved, are ordinarily rated as common charges and apportioned. *Peters v. Warren Ins. Co.*, 1 Story, C. C. 463.

ENGLAND.—When the situation of a ship is dangerous

in a high degree, and the fear of her loss is very great, the services of extraneous persons who rescue her from that peril, who drag her off rocks, disentangle her from surrounding sands or who save her from sinking, are regarded in a different light from mere *assistance* which is paid by the man, by the tide, or by the hour,—and they go under the name of *salvage*. When salvage services to a ship and her cargo are paid for in one sum, in accordance with a previous agreement or a subsequent compromise, by an award of referees, by the arbitration of magistrates or commissioners, or by the decision of the Admiralty Court, that amount is frequently allowed to form an item of the General Contribution, and is divided on the same values as the other common interests. But if special valuations of ship, goods and freight were made by or for the arbitrators, admiralty court &c., for the purpose of coming at a decision, it is the better plan to adhere to those valuations in dividing the salvage. And if the arbitrators &c. specifically name a separate sum of salvage to be paid on each of the interests, those sums should in most cases remain undisturbed and separate in the adjustment. *Hopkins*, 44.

FRANCE.—The expenses of remunerating salvage services rendered for the common benefit, are General Average. When the adjuster can, he determines what expenses have been incurred on account of the ship and what on account of the cargo. But this, in many instances, is extremely difficult, on account of a want of definite information, as, for instance, where money is expended for paying laborers employed in saving and transporting ship's materials and cargo indiscriminately,

expenses of correspondence &c. In such cases the expense is apportioned according to the values saved at the place of saving; and if this cannot be ascertained, then at the place of destination, deducting the freight and landing charges and a certain profit, in order to approximate as near as possible to the values at the port of refuge or place of shipwreck and saving. The expenses incurred by the cargo as a totality are divided between the different kinds of goods partly in proportion to volume and weight and partly in proportion to their respective values. The cost of labor, cartage &c., is divided upon the goods saved according to volume and weight, and the Commissions &c., paid, according to values. *Cauvet*, § 350. *Code de Commerce de France*, art. 400.

HOLLAND.—General Average. *Commercial Code of Holland*, sec. 699, art. 16.

Commissions on advances for General Average purposes.

UNITED STATES.—Commissions on disbursements, loss on exchange, bottomry premium, cost of bond, loss on sound cargo sold to pay expenses, are General or Particular Average, according to the nature of the case, and are apportioned in an adjustment of Average to each interest benefitted.

ENGLAND.—When a merchant or agent makes the disbursements, he charges a commission for advance of funds. This is applied as a percentage to all the columns of disbursements. His travelling and other small ex-

penses usually belong to General Average. The agent very commonly makes a charge for his trouble and attendance, his general supervision of the business correspondence &c. This is most frequently charged to General Average in one sum.

FRANCE.—Commissions on money advanced, differences of exchange, and bottomry premiums, are divided *pro rata* upon the different columns of expenses. *Cauvet*, 374.

Commissions collecting General Average.

Allowed in the UNITED STATES, but not in ENGLAND. In *Barnard v. Adams*, 10 Howard, 270: It was held by the Supreme Court of the United States, that the two and a half per cent. allowed for collecting the General Average, rests upon the usage and custom of merchants and Average Brokers. It is a duty arising out of the unforeseen disaster and resulting directly from it. Usually there are Contributions to be paid out as well as received by the ship-owner. It is a troublesome duty not embraced in their obligation as mere carriers. The usage is therefore not unreasonable. The objection, that it is paying the owners for merely collecting their own debt, is founded on the accidents or peculiar circumstances of the case, and does not affect the general principle, on which the usage is based.

Interest on money advanced for General Average purposes.

Universally admitted to be General Average.

Expenses discharging cargo and carrying to a point of safety—to repair ship.

UNITED STATES.—If a master, in consequence of some disaster, for the common safety of ship and cargo, put into an intermediate port, and there necessarily, and for the common benefit unload the cargo to repair the ship, the expense of discharging cargo and carrying it to a place of safety, is General Average, also the expense of reloading, and accidental damage done to the cargo in consequence of unloading.

ENGLAND.—If the vessel have sprung a leak or have injured her keel or bottom, and it become necessary, in order to get at the damaged part, to discharge the cargo, the labor of discharging is General Average. So are lighter and boat hire with the goods to the shore, cartage of them to the warehouse or other place of safety, the labor taking them into the warehouse, the pay of custom-house officers attending the discharge and warehousing, police or military guards, netage from the ship, use of tackles, planks, baskets for discharging &c. If the cargo be kept in the lighters instead of being landed, some portion of the lighter hire is usually applied to General Average; for it is considered that to hire lighters instead of a warehouse on shore is a more expensive course, and on the other hand the increased expense of transit from the

ship to the shore and warehouse has been saved, and an equitable compensation for it should be made by the Average stater. *Hopkins*, 46.

FRANCE.—When the master, after due consultation with the crew, goes into a port of refuge for the common safety of ship and cargo, the expense of unloading the cargo when a leak in the ship endangers the cargo, and such unloading is necessary to stop the leak, and the leak is stopped, and the voyage resumed, including damage or deterioration to the cargo caused by the unloading, and the expense of storing and reloading the cargo, are General Average.

BELGIUM.—By the custom of Antwerp, the community of interest between the ship and the cargo is considered as interrupted from the moment the cargo, if it be necessary to unload it, is separated from the ship or from lighters in order to be landed. Consequently the cargo is charged with the expenses of landing and conveying to the warehouse, the storage, surveys on it, and the expense of putting the cargo on board again, or on board lighters to be carried to the ship.

HOLLAND.—The expense of unloading the vessel, the hire of warehouses and depots in which the merchandise is deposited which cannot remain in the vessel during the refitting, is General Average. *Dutch Com. Code*, art. 698;

GERMANY.—If the cargo must be discharged as a consequence of the cause which led to the ship putting into the port of refuge, the expenses of discharging and unshipping, and the expense of warehousing the cargo on shore up to the time when it might have been put on

board again, are General Average. *German General Mercantile Law*, art. 708.

DENMARK.—Expense of discharging and reloading cargo and warehouse rent for the cargo, are General Average.

SPAIN.—If the cause of putting into port, be one of itself General Average, then all the expenses of discharging, storage, reloading &c., are General Average; otherwise they are Particular Average.

SWEDEN.—The expenses of discharging cargo, storing, reshipping and stowing of the same, are General Average, when the goods must be discharged in order to repair the ship. *Swedish Merc. Code*, 1865.

NORWAY.—The expense of discharging, warehousing and reshipping the cargo, is General Average, but not the money paid laborers for moving the cargo while in the storehouse, or any other arrangement for the preservation of the same. *Norwegian Mer. Code*, 1860.

Expenses discharging cargo to cool &c. Cargo.

Generally admitted to be General Average.

Expenses discharging cargo, because pumps are choked.

Generally allowed in General Average.

Expenses of discharging cargo in order to extricate ship and cargo from a perilous situation, as, for instance to float a stranded ship, and damage sustained by the goods in consequence.

UNITED STATES.—When a part of the cargo is shipped over into lighters or the long boat, in order to extricate the ship and cargo from a perilous situation, as, for instance, to set a stranded ship afloat, or to lighten a leaky one, and bring her into harbor; the charges of such a measure, as well as the damage sustained by the goods in consequence of it, are General Average. They were exposed intentionally to an extraordinary danger for the benefit of the whole, and this is sufficient to entitle them to compensation.

The same rule would also apply, when a vessel, without being too heavily laden for the usual depth of the port of her destination, is obliged to unload part of her cargo, owing to an *unusual* shallowness, or to any similar cause. For the measure is occasioned by an unforeseen circumstance, and is necessarily resorted to for the purpose of avoiding a danger threatening the whole, and must, therefore, be at the expense and peril of all concerned; and it can make no difference whether such a circumstance take place in an earlier part of the voyage, or at its termination. Only in the latter case, the common lighterage, which would at all events have been paid, must be deducted. *Benecke*, 134. But the case is otherwise, if, owing to the nature of the river or port to which a vessel is bound it become always, or frequently, necessary to unload part of her cargo to enable

her to proceed. Mr. *Phillips* (§1288) says: "Where it is usual for vessels of the same burden as the one in question, to discharge a part of the cargo on the outside of the bar of the port of destination, no Contribution is to be made, though the goods should be damaged in the lighters."

In one case, where a ship was stranded near her port of delivery, and lighters were sent which took out her cargo, and carried it into port, the vessel never being got off, it was held that the expense of lighterage was an Average loss, to which the cargo should contribute. *Heylyger v. N. Y. Firemen's Ins. Co.* 11 Johns, 85.—Mr. *Parsons* (vol. 1, 297) says: "We can understand this case, only on the supposition (which a part of the statement indicates) that the lighters were considered as sent by all the parties, by agreement, for the common benefit, and therefore that the expense was incurred by all. On general grounds we should have said that the ship had earned her whole freight by conveying the cargo to its destination, and must herself pay, or deduct from the freight the expense of the lighters in which it was earned. *Lewis v. Williams*, 1 Hall, 430.

If the goods which are taken out into lighters, for the common benefit, be thereby, or while in the lighters, lost or injured, this, as we have said, constitutes an Average loss; but if, after the cargo is partly taken out, the ship and the cargo in her be lost, and the goods in the lighters saved, they do not contribute for the property lost, for it was not lost for their benefit, nor as a consequence of any measure taken for their advantage.

ENGLAND.—Where, in the course of the voyage, in order

to save a ship from foundering, to float her after stranding, or to enable her to make a port of distress, part of the cargo is put into boats and lighters, and lost before reaching the shore, such loss gives a claim to General Average Contribution; for it is regarded as an intentional exposure of the goods to *imminent* and *extraordinary* risk, with a view to the ship's safety.

If, however, the goods be thus hazarded in the *ordinary* course of the voyage, and not in order to rescue the ship from any extraordinary or impending danger; as where, in the *usual* course of the navigation, they are necessarily sent on in boats or lighters from the ship to the port of destination, their loss gives no claim to Contribution.

If, in the case first supposed, the boat employed for the purpose of taking out the goods, itself belong to the ship, it must, as well as the goods, be contributed for, if lost.

If, however, in the same case, the ship and rest of the cargo be lost, no Contribution is made in respect thereof *by* the goods thus exposed for the general welfare, even though they themselves arrive safe; for, as they do not owe their preservation to the loss of the ship, they cannot be liable to contribute to such loss; neither in case the ship be lost, but the cargo or a portion of it saved, can the portion so saved be liable to contribute for the goods transhipped. *Arnould*, §890.

FRANCE.—The French law enacts, that if goods be lost which are loaded into barks for the purpose of lightening a vessel on entering a river or a port, the loss is to be distributed over the ship and the whole cargo. *Ord. de la Mar. Tit. du jet. art. 19; Code, art. 427.*

The RUSSIAN, PRUSSIAN, ROTTERDAM and other Ordinances of insurance, contain similar directions to those of France. *Rot. Ins. Ord.*, §92-95; *Dan.* 5; *Ord. de Bilbao*, c. 20, art. 14.

The HAMBURG ordinance of insurance (Tit. 22, art. 11) says: "When a master, in order to lighten a vessel in a river, or at the entrance of a port, loads a part of her cargo over into smacks or other small craft, any damage or loss happening to the same is reckoned equal to jettison, and must be paid for as General Average."

HOLLAND.—The expenses of discharging, of lighterage, and other expenses incurred, in order to bring the vessel into a port or river for the common safety of the ship and cargo, when compelled by gales, by the pursuit of enemies or pirates, or by any other cause, to enter such port or river, and also the loss or damage of the cargo sustained by the discharge and loading into lighters or boats of the ship when in distress, and reloading on board the vessel, are General Average. *Dutch Commercial Code*, sec. 699, art. 14.

The new GERMAN law provides: "When in order to lighten the vessel, the cargo has been either altogether or in part discharged into lighters—To General Average belong as well the hire of the lighters as also the damage which may have been done either to the ship or cargo, by discharging into the lighters or by reshipping into the vessel, as also any damage which may have been done to the cargo while in the lighters.

If the lightening of the vessel must take place in the regular course of the voyage, there is no General Average. *German General Mercantile Law*, §708.

Expenses incurred to restore cargo when shifted by perils of the sea.

UNIVERSALLY admitted to be General Average.

Expenses incurred to enable a vessel in the ordinary course to leave her port of loading.

Not General Average, ANYWHERE.

Expenses incurred to enable a vessel to enter her port of destination—to cross a bar or shoal in her ordinary track.

If, owing to the nature of the river or port to which a vessel is bound, it become always, or frequently, necessary to unload part of her cargo to enable her to proceed, this is not General Average. But if the vessel be obliged to unload part of her cargo owing to some *unusual* obstruction, this is an unforeseen circumstance, and resorted to for the purpose of avoiding a danger threatening the whole, and should, therefore, be General Average. *Weytsen*, §30; *Park.*, 7th ed. 1, 205.

M. Cauvet in his *Traite sur les Assurances Maritimes*, says: “When, in going into or coming out of a port, haven or river in the ordinary course of the voyage, it is necessary to lighten the ship, if any of the goods put on board the lighters be lost or *damaged*, the loss or

damage is General Average; but the *expense* of lightering in this case is the foreseen and ordinary expense of making the voyage, and must be paid by the ship-owner.

Expense of bagging a cargo when it is in damaged bags, in a port of refuge.

Is not admitted in the UNITED STATES, ENGLAND or FRANCE to be General Average.

Expense of bagging cargo when it is bulk, in a port of refuge.

Admitted to be General Average in ENGLAND, but not in the UNITED STATES or FRANCE.

Expense of airing and cooling cargo in a port of refuge.

Not General Average.

Expense of coopering casks as far as rendered necessary by discharging.

General Average in the UNITED STATES, but not in ENGLAND or FRANCE.

Pilotage, inward and outward, at a port of refuge.

IN the UNITED STATES, FRANCE, BELGIUM, HOLLAND, GERMANY, SWEDEN and NORWAY, the pilotage both inward and outward is allowed in General Average. In ENGLAND, the inward pilotage is General Average, the outward pilotage a special charge to *freight*.

Warehouse rent &c., on cargo at a port of refuge.

IN the UNITED STATES, FRANCE, HOLLAND, BELGIUM and GERMANY, the warehouse rent is General Average. In ENGLAND, it is special charge to *cargo*.

Expense of re-shipping cargo at a port of refuge.

EVERYWHERE except in ENGLAND this expense is General Average. In ENGLAND it is a special charge to *freight*.

Expense of forwarding cargo to port of destination by another vessel.

UNITED STATES.—When a vessel is condemned and sold at an intermediate port, or is dashed against rocks or land and broken, or otherwise rendered useless by violence and fracture, the community of interest cannot longer be considered to exist; therefore, the charges become special. The sending forward of the cargo being

the means of earning freight, the expense falls upon that interest as a special charge.

If the expense be greater than the original freight, the extra freight is a special charge to cargo, as it was incurred for its benefit solely; and is apportioned in bulk, in proportion as the whole freight bears to the excess, thus :

<i>Freight per Bill of Lading,</i>				
<i>On</i>	1 case - -	\$4 00	<i>pays extra freight</i>	\$1 00
	1 cask - -	2 50	<i>do.</i>	0 63
	1 bbl. - -	1 25	<i>do.</i>	0 31
	1 box - -	0 25	<i>do.</i>	0 06
		\$8 00		\$2 00

The expense of forwarding cargo, must be paid by the insurers of freight, to the full extent of that interest at risk, and by the insurer of cargo if the new freight exceed the old.

In case the expense of forwarding do not amount to the original freight, the surplus freight belongs to the ship-owner, who is responsible to that extent to his underwriters on freight, as so much salvage received by him for their account; and accordingly to be deducted in settlement of loss under the policies.

When the ship is stranded, and the goods are forwarded to the nearest port, which happens to be the destination of the ship; the lightening of the cargo to enable the vessel to float again, and at the same time place the cargo in better safety, is considered by Average adjusters and Underwriters of New York, a legitimate item for Average Contribution. The same charge in Boston, is,

in practice, generally charged to the earnings of the vessel. But if the vessel be wrecked and rendered useless by the stranding, the sending forward the cargo, as we have seen, is a special charge to the interest benefitted.

In ENGLAND—The expense of forwarding cargo to the port of destination by another vessel, is a special charge to freight, unless the expense of reshipping it and the new freight exceed the original freight.

FRANCE.—Freight paid to another vessel for carrying on a part of the cargo from the port of refuge which the ship is unable to restow or carry, is General Average.

When the ship is condemned in a port of refuge as incapable or unworthy of repair, the expense of forwarding the cargo by another vessel, is charged to the interest benefitted.

Hire of lighters at a port of refuge to avoid landing cargo.

As this is a measure usually resorted to for the purpose of curtailing expense, in those ports where the landing, storing and reshipping charges would be General Average, this expense should certainly be allowed.

Wages of men employed to pump, when cargo is on board.

UNIVERSALLY allowed in General Average.

Wages of men employed to pump when cargo is not on board.—Vessel in ballast.

UNITED STATES.—In *Potter v. Ocean Ins. Co.*, 3 Sumner's R. 38, it was decided that where a vessel meets with disaster, and bears up for a port of necessity, wages and provisions are chargeable as in General Average, *although she was in ballast*. The distinction between General and Particular Average being determined by the consideration whether the act be intended for all concerned in the voyage, and not in particular by the consideration who are to contribute to the indemnity. The practice in New York and Boston, is in conformity with this decision, all items applicable to General Average are charged by the adjuster to that column, without regard to whether the vessel has cargo on board or not, and at the end of the Adjustment, they are transferred to the Partial Loss column as being applicable to the vessel alone.

In ENGLAND, FRANCE and other countries the cost of pumping, when there is no cargo on board, is not regarded as General Average.

Wages and provisions of crew during detention at a port of refuge.

We have stated this fully under the head of port of refuge expenses. It is necessary only to repeat briefly, that,—In the UNITED STATES, the expense of wages and provisions of the master and mariners, from the time the

vessel bears away from the course of her voyage to go into a port of refuge, to the time the ship is again ready for sea, is General Average.

ENGLAND.—The wages and provisions of the crew are not regarded as an Average, either General or Particular, but are paid by the ship-owner as an ordinary expense of navigation.

FRANCE.—The wages and provisions, during detention at a port of refuge, are, in practice, regarded as Particular Average, whatever may be the cause of the putting into port, or whether the ship be freighted by the voyage or by the month.

SPAIN.—The 20th article of the 20th chapter of the *Ord. de Bilbao* declares, that in Spain the wages and maintenance of seamen, in case of repairs or other detention in a port, are not General Average. In practice, however, they are generally allowed.

BELGIUM.—Wages and provisions of the crew are rejected from General Average. If the freight be insured, they are considered as a Particular Average on the freight, and are paid by the underwriter on freight, as in France.

ITALY.—The new Code of Commerce, in vigour since the 1st January, 1866, has determined, that the wages and victuals of the crew during the time the vessel is detained in an intermediary port to repair the damage sustained in the course of her voyage, are to be allowed in General or Common Average.

HOLLAND.—The wages and food of the crew during the time the vessel is constrained to remain in port, are General Average.

GERMANY.—The new code lately adopted by the German States, and the free towns of *Lubeck*, *Hamburg* and *Bremen*, determines the wages and provisions of the crew during the stay, also the expense of lodging the crew on shore, and as long as they could not remain on board, to be General Average.

PORTUGAL.—The wages and provisions are General Average.

SWEDEN.—The Swedish Maritime Code of 1865, declares, that the support of the crew while the vessel remains in a port of refuge is General Average ; wages are not mentioned, but in practice allowed.

NORWAY.—The Norwegian Code of 1860, declares, that wages and support of master and crew, which are calculated for the time during which the vessel necessarily must remain, in order to have the damage repaired, are General Average.

DENMARK.—The ordinary wages and provisions for the captain and crew are General Average.

BRAZIL.—The wages and maintenance of the crew, from the day the vessel's course was altered to seek a port of refuge, until she be again supposed to be placed on the same spot, and the lodgment of the captain and crew on shore (if they cannot remain on board,) are General Average. *Commercial Code of Brazil, adopted 1850, Titulo viii, art. 765.*

CUBA.—It is the practice to allow in General Average, the wages and maintenance of the crew during the term of the necessary detention in an intermediate port.

Wages and provisions of the crew during detention for the purpose of prosecuting the voyage on a decree of release.

UNITED STATES.—If the crew be detained during delay, to claim a captured ship and cargo, for the purpose of prosecuting the voyage on a decree of release, the expense of their wages and provisions during such detention is to be contributed for. The Contribution in this case seems to rest upon the same grounds as in case of delay, and seeking a port of necessity, to refit.

A contrary opinion, however was given by Mr. Justice *Jackson*, in the case of *Spafford v. Dodge*, 14 Mass. R. 66. The case grew out of a charter-party. A vessel was chartered at a certain rate per month, for a voyage from the United States to Spain and St. Ubes and back, during which voyage the vessel was captured and carried into Gibraltar, where she was detained under admiralty proceedings from the 6th of January until the 10th of May, when she was acquitted, and finally arrived in the United States. The court said: "The necessary costs and charges incurred in claiming and obtaining the restoration of the ship and cargo are undoubtedly to be allowed as a General Average. As to the wages and provisions of the crew, we are unable to see any ground on which we can allow them." The court considered the case to be distinguished from making a port of necessity to refit, by the latter being voluntary, and rejected the claim on the ground that the charter-party was not dissolved by the capture, and that the services of the master and crew were rendered in pursuance of, and due

by virtue of, their previous contract. But the court was of opinion, that if the time of service of the crew had expired, and a crew had been shipped again at the port to which the vessel was taken by the captors, then the expense of their wages and provisions would have been General Average.

Notwithstanding the decision of this very able judge, the point has been generally decided otherwise. *Leavenworth v. Delafield*, 1 Caines, 573; *Hurtin v. Phœnix Ins. Co.*, 1 Wash. C. C. 400.

A distinction is made in the last cited cases between a capture and an embargo. It is said that a capture dissolves the contract, while an embargo does not, and that, therefore, in the latter case the seamen are under obligations to remain by the vessel, while in the former they are at liberty to depart, and if they remain, this is a voluntary act on their part, and their wages and provisions, therefore, are a subject of General Average Contribution.

The current of decisions is in favor of the proposition that wages and provisions, during a detention by an embargo, are not a subject of General Average, on the ground that it is not a voluntary sacrifice. *McBride v. Mar. Ins. Co.*, 7 Johns, 431; *Harrod v. Lewis*, 3 Mart. La., 311; *Penny v. N. Y. Ins. Co.*, 3 Caines, 155; *The Nathaniel Hooper*, 3 Sumner, 542, 557.

ENGLAND.—MR. *Hopkins* (49) says: "Although, by the English custom, the wages of the master and crew are not generally chargeable in General Average, there is one case in which they are rightly admitted; and that

is, when, a ship having been captured or detained in a foreign port, it is necessary for the master and some members of the crew to remain with her for the purpose of making and substantiating a claim for her restitution together with the release of her cargo. But if the ship be detained under an embargo only, the wages are not allowable and remain at the owners charge."

FRANCE.—Wages and provisions of the crew who remain on board to guard or reclaim a captured ship and cargo, are General Average.

In HAMBURG it is customary to include wages and provisions in the General Average, in all cases of detention of the ship and cargo.

Extra wages to men to supply the places of deserters at a port of refuge.

Not General Average. 2d *Phillips*, p. 85. *Hughes on Ins.*, p. 292.

Gratuities promised to seamen, in time of danger.

UNITED STATES.—As a general rule, gratuities to sailors, paid or promised, to increase their exertions during peril, do not constitute an Average loss.

There are a few exceptional cases, however, where the judgment of the Adjuster must decide whether the circumstances bear out some additional payment to the crew—as, for instance, when a ship in a disabled con-

dition puts into a port where leaks cannot be stopped, or where repairs cannot be effected without very heavy expenses, and it becomes highly desirable to reach, if possible, the place of destination, yet the Consul is of opinion that the ship's company cannot be forced to go to sea again in the vessel's then condition ;—in such a case, if the offer of additional pay, and an allowance of additional provisions prevail with the crew to proceed on the voyage, and to redouble their exertions, the result of such an arrangement would justify the proceedings, and the parties interested would scarcely object to a payment productive of so much advantage to themselves and questionable on more theoretical considerations only.

ENGLAND.—The ordinary crew of a ship are not to be paid an additional sum for their extraordinary exertions, because it is their bounden duty to give their utmost efforts for the preservation of the ship and the prosecution of the voyage.

Temporary repairs to a ship at a port of refuge.

UNITED STATES.—The rule is laid down by Mr. *Phillips* §1300, as follows: “Temporary repairs of damage from extraordinary perils of the sea, made at some intermediate port for the purpose of prosecuting the voyage, where thorough repairs could not be made, or would cause unreasonable delay, or be otherwise attended with material inconvenience and prejudice to all concerned, so far as such temporary repairs are of no peculiar benefit to the ship-owner, and leave him subject to the same ex-

pense in prosecuting the voyage, and subsequently making repairs, as if the same had not been made, are General Average."

"The ground of claim for Contribution is to be strictly limited, since it belongs to the ship-owner in general to furnish a seaworthy ship, and, as far as it is practicable, to keep it in a condition suitable for prosecuting the voyage. The exception to this rule does not depend upon what is most for his interest solely, but upon what is beneficial to all concerned. Subject to such conditions, the temporary repairs belong to General Average." See also 1 *Parsons*, 293 ; 7 *Pickering's R.* 259 ; 2 *Metcalf Rep.* 140.

The *practice* with reference to repairs, both permanent and temporary, is in *New York*, *Boston* and other principal ports, as follows :

When repairs are made to a vessel, by reason of a voluntary damage or sacrifice, incurred for the general preservation, they are to be contributed for by the interests benefitted—less from permanent repairs, the usual deduction of one third new for old.

. When, by reason of accidental damage, the materials of the vessel are applied to extraordinary use, they are also to be contributed for, subject to similar deductions.

When, by reason of accidental damage, say stranded on a beach distant from a port where repairs could be made, materials are purchased to enable the voyage to be prosecuted, and preserve all the interests from imminent danger of destruction, for example—canvass coverings, tarred paper, planks for sheathing on the bottom &c., all for temporary stoppage of the leak, they are to be

contributed for, net, without the deduction.

When a vessel is in a port where repairs can be made, the owners are bound to make them at their own expense. Repairs only temporary in their character, can be claimed from the underwriters on the vessel, without the usual deduction of one-third ; other repairs as agreed upon in the contract of insurance.

Temporary repairs made at a port of refuge, to avoid the expense of complete repairs, which would greatly exceed those at the home port, being of no benefit to the cargo, are charged to *Partial loss net*. But if any benefit still result to the ship from the repair, it is subject to a deduction of one-third, like other repairs.

If sails which have never been set, or uncoiled ropes be destroyed for repairs, the ship-owner has a right to claim for their value without a deduction of one-third new for old.

Adjusters find, by experience, that repairs done to a ship are always of some benefit to her, and therefore doubt, whether any part of those repairs, which in themselves are of the nature of a Particular Average, can ever be construed into a General Average ; hence the rule, *in practice*, is as we have stated it.

ENGLAND.—Temporary repairs are not General Average, except under certain circumstances—for example, when the alternative would be incurring other expenses which would be General Average.

The *practice* in England is stated by Mr. *Hopkins* (108) as follows : “ Those temporary reparations done in ports where the vessel cannot be restored perfectly and permanently, but which may suffice to allow her to com-

plete her voyage, having to be taken away afterwards, are clearly not to be held in any way to be meliorations, must be charged in Particular Average in full." That is to say, without the deduction of one-third new for old.

Diving under and examining the ship's bottom, to avoid the necessity of discharging cargo.

General Average.

Expenses on Passengers at a port of refuge.

In passenger ships, the provisions &c., laid in specially for passengers are not part of the general property insured under the name of ship. They are generally protected by a separate policy, and therefore the expenses incurred on passengers at a port of refuge, are not charged to General Average, but to the underwriters on passage money. This is the rule in the UNITED STATES and ENGLAND; in FRANCE the expenses are frequently allowed in General Average.

Ship's provisions consumed by workmen from the shore, when employed in repairing General Average losses.

An equitable value of the provisions thus used, is allowed in General Average.

Provisions consumed by wreckers, placed on board to extricate the vessel from an impending peril, and while transporting her to a port of safety.

Made good to the ship in General Average Contribution.

Bottomry premium on expenses incurred at a port of refuge.

UNITED STATES.—Charged to cost of funds, and apportioned *pro rata* among the several interests for whom expenses were incurred.

ENGLAND.—Not General Average, except on that portion of expenses allowed in General Average.

FRANCE.—The premium on borrowing money on bottomry or respondentia, and the cost of borrowing, are added to the principal of each Average, in the proportion that it bears to the total expenditure.

HOLLAND.—The marine premium on money borrowed on bottomry to pay General Average expenses, is charged to General Average.

GERMANY.—The German General Mercantile law (sec. 708), declares, “When losses and expenses have been incurred in obtaining the moneys necessary for payment of General Average during the voyage, or when expenses have been incurred in apportioning the amounts among the parties interested—These losses and expenses also belong to General Average. Hereto belong more

particularly, the loss on goods sold during the voyage, the bottomry premium when a bottomry bond has been given for the advance of the necessary moneys; when this is not the case, the premium of insurance on the moneys expended."

SWEDEN.—The premium for bottomry bond, when such must be given, in order to procure the money necessary to be expended on mutual account. Expenses of issuing bills of exchange, insurance and lawful interest when the means are obtained in any other way, are allowed in General Average. *Swedish Maritime Code*, 1865.

Insurance on expenses incurred at a port of refuge.

UNITED STATES.—Charged to cost of funds and apportioned *pro rata* the same as bottomry premium.

IN ENGLAND, FRANCE and other countries, the same rules applying to bottomry premium, apply to insurance on expenses.

Landing cargo when a vessel is wrecked, or properly condemned at a port of refuge—when is the community of interest dissolved, so as to cause the General Average charges to cease?

UNITED STATES.—The liability to General Average continues until the interests have become completely sepa-

rated, and there is no longer any community of interest remaining.

If the enterprise be not abandoned, and the property be still under the control of the master of the vessel, and liable to be again taken on board for the purpose of prosecuting the voyage, the common interest remains, and whatever is done for its protection, is done at the common expense.

The case of *Nelson v. Belmont*, (5 Duer, 310), grew out of expenses consequent upon going into a port of refuge, and there discharging the cargo, and involved a decision of the point as to the time, when, in the history of the transaction, the community of interest was broken up or dissolved, so as to cause the General Average charges to cease. The court decided, that, if the voyage be not abandoned, and the property although separated from the rest and removed from the ship, be still under the control of the master, and liable to be taken again on board for the purpose of being carried to its destined port, the relations of the several owners are in no respect changed. The common interest remains, and whatever is done for that common interest, must be done at the common expense.

The case of *McAndrews v. Thatcher*, decided by the Supreme Court of the United States, at the December term, in 1865, grew out of expenses incurred in refloating a stranded ship, and involved a similar question. The case was this : The ship *Rachel*, laden with a general cargo, bound from Liverpool to New York, after arriving inside of Sandy Hook in a heavy gale, on the 21st day of

September, 1859, struck on the West Bank in the lower part of the harbor of New York, and became fast. The master employed steam tugs for two days to get the ship off without lightening; but failing in this, he lightened the vessel by discharging the cargo in lighters, and transported it to its destination. The agents of the ship received the cargo, and delivered it to the consignees upon receiving from them the customary Average bonds. The cargo being discharged, or all but mere remnants of it, and the ship settling fast in the sand, and the tide ebbing and flowing in her, the agent of the ship refused to authorise further expenses, and the captain and crew abandoned the ship, and left her where she lay, in charge of the agent of the underwriters on the ship, who had arrived at the ship a day or two before, and who had already procured oil casks to buoy the ship. The agent of the underwriters continued his endeavors to refloat the ship until the 11th of November following, and on that day, by the assistance of two steamers, he succeeded in getting her free, and towing her to a marine railway for repairs. Examination there made showed that there were remnants of the cargo still left on board, and upon that discovery they were discharged and delivered to the consignees. The suit was brought by the ship-owner against the consignee of a part of the cargo to recover in General Average his Contributive share of the expenses of refloating the ship. It was conceded that the defendant was liable to Contribute in General Average, to the expenses incurred in refloating the ship up to the time when the master abandoned the ship, and the agent

of the underwriters on the ship took charge. But the question was, whether he was liable to the expenses subsequently incurred under the management of the agent of the underwriters.

Mr. Justice *Clifford* delivered the opinion of the court, which decided as follows :

“ 1. Except when the disaster occurs in the port of destination, or so near to it that the voyage may be regarded as ended, the master, if the goods be not perishable, has the right, and, if practicable, it is his duty, to get off the ship, reload the cargo and prosecute the voyage to its termination.”

“ 2. When the whole adventure is saved by the master, as the agent of all concerned, the consignments of the cargo first unladen and stored in safety are not relieved from Contributing to the expenses of saving the ship, provided the ship and cargo were exposed to a common peril, and the whole adventure were saved by the master in his capacity as agent of all the interests, and by one continuous series of measures.”

“ 3. The rule is, that if the ship also be saved by the same continuous series of measures as those by which the cargo was saved, then the cargo is bound to the ship, and the ship to the cargo. They are so bound because the liability to such Contribution continues until the part of the adventure claimed to be exempted is completely separated from the residue, so as to leave no community of interest remaining.”

“ 4. The general rule is, that when the cargo continues under the control of the master, so that it may be

taken on board for the purpose of prosecuting the voyage, the common interest remains."

"5. The plaintiffs in this case are not entitled to recover, because it appears not only that the cargo was delivered to the consignees, but that the series of measures employed by the master, and through which he saved the cargo, failed altogether to save the ship."

"6. They cannot recover, because the expenses in controversy were not incurred by the master, but by the underwriters of the ship, after the master had saved the cargo and abandoned the ship, and all endeavors to save her from disaster."

"7. When the master abandoned the ship and all endeavors to save her, the separation between the ship and cargo became complete, and all community of interest was gone."

Judge *Marvin*, delegate to the International Congress held in England in 1864, in his report to the Chamber of Commerce and Board of Underwriters of New York, very ably reviews this subject, "Community of interest," and referring to the decision we have last cited, says: "Notwithstanding some uncertainty in the precise meaning of the language employed by the Supreme Court in its decision in the case of *McAndrews v. Thatcher*, yet I think this case, when interpreted by the case of *Nelson v. Belmont*, does decide that a complete separation of the cargo from the ship by the master or owner, *not again to be returned to the ship*, dissolves the community of interest between them, whether such separation take place at a distance from the port of destination or by a

delivery by lighters at the port of destination, and that consequently all General Average charges thereafter cease. Such a separation, when it takes place at a distance from the port of delivery, is equivalent to the abandonment of the voyage; and when it takes place by a delivery at the port of destination, it is equivalent to a completion of the voyage as to cargo, which can no longer derive any benefit from the expenditure of money on account of the ship. The abandonment of the voyage is also held to dissolve the community of interest."

"The objection to considering a separation of the cargo from the ship, *not again to be returned to it*, or the abandonment of the voyage, as the point of time when a dissolution of the community of interest takes place, is, that the standard is variable and uncertain, depending as it does upon the *intentions* of the master. It also gives the master the opportunity to delay for months in a port of refuge in order to make up his mind whether to abandon his voyage or not, and upon the abandonment and transshipment of the cargo by another vessel, to charge the expenses of the delay, including the wages and provisions of his crew, to the account of General Average, when, at the same time, the cargo has derived no possible benefit, but has probably sustained a damage from such delay. In the case, too, of a stranded ship, it gives him the opportunity, and indeed encourages him, to expend large sums of money in trying experiments to re-float the ship, knowing that, notwithstanding his failure, he will be reimbursed the expenditure in General Average, out of the cargo, which has derived no benefit whatever from the expenditure. It appears to me that com-

mon benefit realized, and not common benefit intended merely, is the very foundation of common Average, and as the cargo derives no benefit from the delay, or from the fruitless experiments in the cases mentioned, it ought not to be held to contribute to the expenses. If the delay or the experiments result in success, and a reshipping of the cargo on board and a resumption of the voyage, then the cargo does derive a benefit from the expenditures in common with the ship and freight, by being transported in the ship to its port of destination."

"It appears to me it would be wiser to look more to the *fact* and less to the *intention* of the master, and to say, that the separation of the ship and cargo during the voyage, followed by a subsequent reunion, for the purpose of prosecuting the voyage, does not suspend or dissolve the community of interest between them; but that such separation, not followed by a reunion, for the purpose of prosecuting the voyage, does dissolve such community of interest, and puts an end to any further General Average charges."

ENGLAND.—The difference between the English and the American customs in relation to the point of time when the community of interest, as it regards the adjustment of Average, should be considered as broken up, appears to be this. The English custom is based on the idea that the motive or inducement to the General Average act or expenditure *must* be the common "physical safety" of the ship and cargo at the time, without regard to the successful completion of the voyage, by the arrival of the ship and cargo together at their port of destination. It is based on the common safety, not ultimate

benefit. Hence, by the English custom, the landing and storing of the cargo, in a port of refuge, interrupts or suspends the community of interest between the ship and cargo, and consequently, all General Average charges cease, until they are again reunited for the purpose of prosecuting the voyage. The cargo pays its own storage, and the freight pays the expense of reloading. The ship pays the expenses incurred by it, including the wages and provisions. The landing and storing of the cargo of a stranded ship, by the English law, interrupts or suspends the community of interest between the ship and cargo, so as to exclude from General Average, the expenses subsequently incurred by the master, in the prosecution of any new measures, in getting the ship off, notwithstanding the cargo may remain under the control of the master, and he may afterwards take it again on board, and carry it to its port of destination. *Job v. Langton*, 6 Ellis & Black, 779; Judge *Marvin's* Rep. 58.

BELGIUM.—The Belgian custom as to when the community of interest is dissolved or broken up, is the same as the English, with, however, this exception, that by the Belgian custom, the landing of cargo alone, interrupts or suspends the community of interest between the ship and cargo.

FRANCE.—Article 400 of the *Code de Commerce* reads: "And in general, damages voluntarily suffered and expenses incurred, after deliberation and consultation with the crew, for the common benefit and safety of the ship and goods from the time of their loading and departure

to their arrival and unloading, are General Average."

This article is diversely interpreted. The last interpretation placed upon it by the Court of Cassation seems to strike at the root of a very large class of cases before considered, in France and in other countries, to be General Average. In the case of the ship *L'Amiral Casey* (cited by Judge *Marvin* in his Report on International General Average) the court said: "Every expense incurred for the ship benefits the cargo; but in order that it may be classed in General Average, it must proceed not from a voluntary act, isolated and special to the merchandise or to the ship, but must be incurred *simultaneously* for the common safety of the ship and cargo; and such is the express meaning of article 400 of the Code." "This interpretation," says Judge *Marvin*, "is undoubtedly in strict conformity to the letter, but contrary to the spirit, of the law as interpreted by *Valin*, *Pardessus*, *Boulay*, *Patty* and other distinguished luminaries of the law. The employment of the word 'simultaneously,' as used by the court, wonderfully restricts and limits the range of the doctrine of General Average, and leaves it a mere shell without much kernel.

Whether specie, bank bills, and goods of passengers be held liable to contribute in General Average for jettison, or other sacrifice. Also, whether the expense of landing specie when a vessel is wrecked or properly condemned at a port of refuge, be General Average.

UNITED STATES,—By the *Rhodian* law, every thing on

board the vessel saved contributed to make up the loss, and in the essay on that law concerning jettison, translated from the digests and code of *Justinian*, it is said : Several merchants had loaded various quantities of goods on board the same ship, in which were several passengers, both freemen and slaves. In consequence of a violent storm, a jettison became indispensable. It was asked whether all must contribute to the jettison, and whether those must contribute who had goods on board the vessel, such as pearls, jewels &c., and whether there must be a contribution for the heads of freemen, and by what action it could be enforced. It was determined that all must contribute who had an advantage from the jettison, because it was a tribute due by those things which had been preserved, and therefore that the owner of the vessel was bound to contribute for his share; the amount of the jettison must be apportioned according to the value of the goods. It has also been agitated whether an estimation is to be made of the clothes and jewels of every person; and it was unanimously agreed that they should contribute. Mr. *Arnould* thus announces upon what property Contribution is to be levied :— “all which is ultimately saved out of the whole adventure (*i. e.* ship, freight and cargo), contribute to make good the General Average loss, provided it had been actually at risk at the time such loss was incurred, but not otherwise, because, if not at risk at the time of the loss, it was not saved thereby.” (2 *Arnould*, 921). Gold, silver, jewels, precious stones and all other small articles of value, unless carried about the person, contribute. He, says Mr. Phillips, thinks that bank notes, being not

so much property as evidences of property, ought not to contribute. Nesbett, he observes, considers that they should, and his seems to be the better opinion, for they are convertible into money and are saved by the sacrifice from becoming valueless (2 Arnould, 923). Mr. *Phillips* says: As much of the cargo on board at the time of making the jettison, or other sacrifice for the general safety, as finally arrives at the port of delivery, or comes to the use of the owner, contributes in General Average.

Mr. *Benecke* says: Passengers ought to contribute for their trunks and luggage, because if cast overboard their value is allowed for. *Phillips* says, this reason does not appear very satisfactory—a plainer one seems to be, that the baggage is benefitted by the jettison in proportion to its value, in comparison with its whole value at risk, precisely as any other property is so. *Emerigon* is of the opinion that of right and upon general principles, everything belonging to passengers, even to their wearing apparel, is liable to Contribution. *Valin* considers the wearing apparel, jewels, rings, ornaments and, in general, whatever a passenger habitually wears, uses or carries about his person, during the voyage, including his change of linen, to be exempted from Contribution, by the concurrent authority of the ordinances and writers. And Mr. *Phillips* says this seems to be the general practice. He adds: If any part of the baggage be of sufficient value to be worth bringing into Contribution, no reason has been given why it should not contribute a part of the contributing interest. The reason for exempting wearing apparel and the like seems to be that the persons of those on board are not brought into Contri-

bution, and the exception extends to things which are merely necessary to the person. This discussion shows how universally all that is on board ship, at the time of the jettison, and saved from the impending peril, is called upon to contribute, and the only exception is the persons on board and what is necessarily attached to them. And the reason given for the exemption of the person on board, is, that it is impossible to estimate the value of freemen. Slaves, on board at the time of jettison, have been valued and made subjects of Contribution. Park, Justice, in *Brown v. Stapleton* (4 Bing. 119), says: The rule is that all merchandise put on board for the purpose of traffic is liable to be brought into Contribution, and in merchandise is included all property of great value, unless attached to the persons of the passengers, but property so attached does not contribute.

It may therefore be considered as settled by text writers and by judicial authority, that all property, on board at the time of the jettison and saved, unless attached to the persons of the passengers, is to be brought into Contribution. In practice, however, the effects of passengers, not paying freight, do not contribute.

In *Harris v. Moody & Telfair*, 3 N. Y. Reps., 266, it was held, that bank bills are to be regarded as property, the goods and chattels of the owner thereof; and in case of loss, the owner is entitled to recover the nominal or par value thereof, in the absence of any proof of depreciation with the interest thereon. See also, *Bevan v. Bank of the United States*, 4 Whart., 301; *Nelson v. Belmont*, 5 Duer, 310; *Millar on Ins.*, 344, 345; *Parsons' Maritime law*, 323.

Hogeboom J. in *Harris v. Moody*, 283, said: "It is said that subjecting bank bills to liability is the introduction of a new principle, and would be disastrous if practically carried out, because if liable to contribute when saved, they are equally entitled to Contribution if lost, and that the large sums and extraordinary values thus brought into the account for Contribution would absorb the price of less valuable property, and therefore dictate the rejection of the principle. This consideration cannot be indulged. In the first place, jettison of articles of such light weight and such great value, is not permitted except in cases of emergency, and therefore they are much more likely to suffer, than to exact, Contribution. In the next place there is no practical injustice in allowing and enforcing Contribution according to a just valuation." *Davies J.*, in the same case, said: "It would seem to be well settled, that bank bills are to be regarded as property, the goods and chattels of the owner thereof; and that, in case of loss, the owner is entitled to recover the nominal or par value thereof, in the absence of any proof of depreciation, with the interest thereon." *Ingram J.* did not concur in the opinion of the other judges, that bank bills are property, under the law relating to Contribution and Average. Upon that point he was for reversal. All the other judges being for affirmance, judgment was affirmed.

In *Nelson v. Belmont*, 5 Duer, 310, the ship *Galena* being on fire in her hold at sea, the master transferred a quantity of specie on board a Danish brig, and both vessels proceeded into a port of refuge, where the specie was landed and deposited in bank by the master of the

ship on board of which it was originally shipped. Fire engines were then employed to pump water into the ship to extinguish the fire, whereby the ship and cargo were damaged. The ship was unloaded, the cargo stored, and the voyage afterwards abandoned by the master. It was decided by the court, that the specie was liable to contribute, in General Average, to the damage done to the ship and rest of cargo by the water pumped into the ship to extinguish the fire, to the expenses of the fire engines and of unloading and storing the cargo, and the wages and provisions of the crew up to the time the master abandoned the voyage. Justice *Selden*, in delivering the opinion of the court, admitted the rule to be, that goods, or any interest, were not liable to contribute for expenses incurred subsequently to their being *at risk*; but he argued, that the specie was at risk—the risk of the loss of the voyage. “In determining this question,” he said “it will be necessary to recur to the principle upon which General Average is based. That principle is, that where several persons are engaged in a joint enterprise, whatever is necessarily done for the common benefit ought to be done at the common expense. It is of the essence of this principle that it looks upon the enterprise as a whole, as an entirety. It is true, that in apportioning the loss, regard is had to the interests of the respective parties. But in other respects, no separate interest is recognised. Until, therefore, some portion of the property has been separated from the rest, so as no longer to have any interest in common with it, every risk which affects the enterprise as a whole must

be regarded as affecting each portion of the property engaged."

"Such separation may, and frequently does occur, in the course of a voyage. For instance, in a case of jettison, the goods jettisoned do not contribute for any damage afterwards done to the residue of the cargo. If the goods forming a part of the cargo be sold for the necessities of the ship, or be delivered to the owner or consignee either before or after the arrival of the vessel at its port of destination, and before the occurrence of a General Average loss, they do not contribute. So, a separation may occur, through the withdrawal, by the owner of a portion of the goods, before the termination of the voyage. This every owner has in general a right to do, at any time, on payment of freight for the entire voyage, and the goods thus withdrawn are exempt from contribution for any subsequent loss, upon the principle that it is the goods at risk only which contribute."

"My conclusion, therefore, is, notwithstanding the case of *Bevans v. The United States Bank*, that if the owner of any portion of the cargo, even after a peril has occurred, and after a series of measures to avert has been commenced, can succeed in so separating his own property from the rest that it is no longer in any sense at risk, he cannot be held liable to contribute to the expenses subsequently incurred. But, in order rightly to apply this rule, it is necessary to ascertain the full scope of the term 'at risk.'"

"Physical destruction, or direct physical injury to the ship, or cargo itself, is not the only risk to which

property so situated is exposed. Its value depends, or at least is supposed to depend, in some degree upon the successful prosecution of the voyage. Whatever threatens the voyage, therefore, is a peril to the entire property. Until that be broken up, unless the property claimed to be exempt be not only separated from the rest, and put in a place of safety, but entirely disconnected with the enterprise, it must be regarded as still at risk, and liable to contribute. If the voyage be not abandoned, and the property, although separated from the rest and removed from the ship, be still under the control of the master, and liable to be taken again on board for the purpose of being carried to its destined port, the relations of the several owners are in no respect changed. The common interest, must be done at the common expense."

"The result of these principles when applied to the present case is plain. It turns entirely upon the nature and object of the separation of the specie from the ship *Galena* and from the residue of the cargo, when it was placed on board of the Danish brig. I entertain no doubt that such a severance as would have exempted it from all liability to contribute to the subsequent expenses, might have been effected by the master of the vessel in the same manner as by the owner himself, had he been present. The master is the agent and representative of each of the owners in respect to their several shares of the property under his charge, and has the same right which the owners themselves would have to take measures for its preservation."

"If, therefore, the captain of the *Galena* had put the

specie on board the brig, not in any event to be returned to him, but to be taken by the brig to its port of destination, and the latter had then been suffered to pursue its course, the specie would not have been subject to Contribution for any subsequent expenditures to save the Galena. And notwithstanding the brig was employed to attend the Galena to Charleston, if it had been distinctly understood between the two commanders that the specie was committed entirely to the custody of the Danish captain, and was in no event to be returned to the care of the captain of the Galena, it would then also have been exempt."

"But the facts do not warrant this assumption. The case states that 'the specie was put on board the brig because it was safer there, as, in case the fire broke out, it might be too late to transfer it from the ship.' The brig was to accompany the Galena to Charleston, and there is nothing from which it can be inferred that it was the intention of the captain of the latter to relinquish his control of the specie. The fact that he reclaimed, and took it from the brig as soon as he arrived in Charleston tends strongly to the opposite inference. It never ceased, therefore, up to that time, to constitute a part of the cargo of the Galena; and if the fire had been previously extinguished and the voyage resumed, it would, of course, have been again taken on board and carried forward in her."

"The case states, that while at Charleston the captain of the Galena determined to abandon the voyage. It follows, from what has been said, that up to that time

the specie remained liable to contribute to the General Average.

IN ENGLAND the expense of landing specie when a vessel is wrecked or properly condemned at a port of refuge, is, in practice charged to underwriters on specie only which do not pay for landing rest of cargo.

HOLLAND.—The Dutch Commercial Code declares, that coined money shall contribute in General Average, according to the exchange at the place where the voyage terminates.

Agent's commission, or per centage on value of cargo landed at a port of refuge, commonly called "Custody Commission."

UNITED STATES.—If the master, when necessary, employ an agent or consignee, in a port of distress, to advise and assist him in taking care of the property or in repairing the vessel, such agent is entitled to be paid a reasonable compensation for his services, usually called by merchants, a commission. The master has no authority to agree to pay an unreasonable commission; a proper charge for storage and a regular commission for the general business of the ship under repair, will afford in most instances, a fair and adequate remuneration. In some ports the commission on the value of cargo landed is very exorbitant. When unloading is absolutely necessary, an intelligent ship-master will always ascertain before he proceeds to discharge his cargo, what this commission will be, and should an unreasonable sum be re-

quired, he can obviate the difficulty by keeping the control of the cargo in his own hands, and hiring store-room himself. The master should be careful not to consign his vessel in a port of refuge, until he have fully informed himself as to the charges, commissions and all other expenses that are likely to arise in consequence of his doing so. This he can generally do through the agent of the underwriters, whose duty it is to render the ship-master such advice and assistance as he may need. If the master neglect to consult the underwriters' agent, but consign his vessel at once, agreeing to pay the customary commissions, which, we repeat, are usually very exorbitant, a suspicion will, in many instances, be cast upon the integrity of his transactions, which may be found exceedingly difficult to remove.

The Chamber of Commerce of New York has recommended to be charged by the consignee, in the absence of any agreement to the contrary, a commission of two and a half per cent. on the *value* of the *invoice*, for landing and reshipping goods from vessels in distress. Whatever weight this recommendation may have as evidence of what is a reasonable charge to be made for such services when rendered in that city, it has no weight whatever as applied to the like services, when rendered in other places. The law-merchant has fixed no particular rate of compensation for such services, but it allows a *quantum meruit* determined in each case by its own facts. It is not competent for any Chamber of Commerce or any State Legislature to introduce into the Commercial code any alterations or new provisions, which shall affect the interests of non-residents; and, certainly, the

general practice of allowing to the master's consignee a commission on the value of the *invoice* of a cargo for landing and reshipping it, is not the wisest mode of determining his compensation, in many parts of the world. In *Mason v. The Jackson Ins. Co.*, tried in the Superior Court of the city of New York, a few years since, in which the Average statement showed that the master's consignee at New Orleans had charged \$2,400 87, being two and a half per cent. commission on the value of the cargo, for landing and reshipping it, the ship being in distress, the jury found a sealed verdict, in which they said they did not hesitate to pronounce the commission charged, "a most exorbitant and unreasonable charge."

The commission on value of cargo landed and reshipped, when charged, is, in practice, allowed in General Average.

Expense of Surveys.

UNITED STATES.—On arrival at an intermediate port in distress, the first survey held on the vessel, as it regards the collective interests, is General Average. So are all other surveys requisite for the instruction of the master as to the measures to be pursued for the common interest.

When surveyors are intelligent and faithful in the discharge of their duties, uninfluenced by private or local interests, their report is entitled to credit, and is a very useful document in the settlement and adjustment of losses. But, the master is, in no case, bound to follow

the recommendation of surveyors, nor will their recommendation relieve him or his owners from any portion of their just and legal responsibility for his acts. Under the impression that surveys are necessary to justify the acts of the master, and that the cost of them is General Average, he permits the consul or agent to send on board his vessel several sets of men, at different times, going through all the forms of written appointment, return and record ; when, perhaps, only one survey and one report, comprising distinctly what they saw and recommended, is all that is needful. It is obvious that this practice of multiplying papers, is done not so much with a view of benefitting the master or his owners, as with a view of justifying charges. Not only are the consul's and agent's own fees thus enhanced but, incidentally, more surveys are called, and more reports made and authenticated, than are useful or needful. This practice has increased so much of late years, and reflects so much on the skill, judgment and intelligence of the master, that he who wishes to advance his reputation, especially with underwriters, should take every precaution to check the abuse. No vessel can enter a South American port in distress, and escape the payment of four or five hundred dollars to surveyors and consular officers, if the master quietly submit to the imposition. And it is to be regretted, that this practice prevails to a greater extent amongst the representatives of the United States in foreign ports, than with others. Attempts have been made to reform this abuse by Federal Legislation, but as yet without success.

The consul requires the master to address him a writ-

ten request for survey. He then makes an appointment of two or more persons and these persons examine the vessel and make a written report, for which service the consul pays them a large fee. The consul records the master's letter, the act of appointment, and the report, makes a report of the authenticity of each, and two or three copies, all of which he authenticates, and charges for each certificate. Thus a mere preliminary survey is made to cost from seventy-five to one hundred dollars, when the whole thing might and should be accomplished for ten dollars.

There is neither law nor necessity for the interference of a consul of the United States in the appointment of surveyors. Any competent men may be selected, with the approbation of the master, and he may agree with them as to fees, in the same manner as he may bargain for any thing else. Whenever their reports are finally made up, it will be expedient to have one certificate from the consul that the surveyors appeared before him and verified their acts, but even this is not absolutely necessary.

In nearly all the considerable sea-ports in the world, the underwriters have appointed merchants of experience as their agents, with instructions to offer immediate assistance, and such advice as may be required by ship-masters who may be so unfortunate as to meet with disaster. It will greatly facilitate the master, in all his transactions in a port of refuge, if he consult the underwriter's agent, who is, in general, a merchant of well known respectability while the fact of the agent's appro-

ving of the surveyors selected by the master and his presence at the holding of the survey, will be a sufficient guaranty of the honesty of the master's intentions.

ENGLAND.—If the ship be injured, or supposed to be injured when she enters a port of refuge, in nearly all cases a survey is held, on her arrival there, by competent nautical men, who recommend, after their inspection, the course necessary to be pursued, whether to discharge the cargo, repair damages, or continue the voyage in her then condition. This first survey regards the collective interests, and is, therefore, General Average. *Hopkins*, 46.

FRANCE.—The cost of surveys of ship or cargo is apportioned or divided according to the character of the subject surveyed or the damage. The cost of surveys of Particular Average to the ship is particular, of General Average, general, being accessorial to the nature of the original cause of survey. *Cauvet*, 374.

Expense of shipping an anchor and chain after a chain has parted.

UNITED STATES.—General Average, less usual expense, if the necessity be urgent. *Other countries* the same.

Cost of an unsuitable anchor and chain supplied under such circumstances when no suitable anchor and chain are procurable there, or it forms no part of the master's duty to get them there.

General Average, less proceeds.

Hire of an anchor and chain under such circumstances, to avoid purchasing an anchor and chain.

General Average.

Expense of freeing the master when arrested for his own, or his owner's debts.

UNITED STATES.—Where a master is arrested in the course of the voyage for a debt due from himself and his owners, but not the subject of Contribution in General Average on the pending voyage, and the goods of a shipper are sold to raise funds to pay the debt and discharge the master from arrest, the interest of the other shippers in the discharge of the master is not such as to subject them to Contribution for the goods so sold. The remedy is against the master and owners.

ENGLAND.—Not General Average. *Dobson v. Wilson*, 3 Camp., 480.

FRANCE.—Not General Average.

CONTRIBUTORY INTERESTS.

Ship.

UNITED STATES.—The true value of the ship for Contribution, is the amount that her hull, masts, yards, sails, rigging and stores would produce after the sacrifice is made, with the addition of the amount made good by the General Average Contribution. Her contributory value, in fact, is her worth to the owners in the state in which she arrives.

In case of *voluntary stranding*, the measure of loss is not the value at the commencement of the risk, as in case of total loss under a policy upon the ship, but the value at the time when the ship is run aground. The inquiry, therefore, will be, what the ship would have been worth to the owner at that particular time, if he could have had it in security, free from any impending peril.

ENGLAND.—The value of the ship for Contribution is her value at the time of her arrival at the termination of the voyage; but if she have met with damage and have been repaired before arriving at her port of destination, the value to be taken, is, her worth previous to such repair.

Where parts of the ship have been sacrificed for the general benefit, and the cost of them is made good in the Average Contribution, the amount of such *bonifica.*

tion is to be added to the value of the ship, upon the same ground that the value of goods jettisoned must be made to contribute to the jettison itself. *Hopkins*, 77.

IN FRANCE, PORTUGAL and BELGIUM, the ship and freight contribute for one half their respective values, and the cargo for the whole. If the ship have been repaired subsequent to the accruing General Average, it is its half-value in its antecedent condition of damage which is taken in practice as the basis of Contribution. The favor which the law shows to the ship-owner in requiring him to contribute on the half-value only of the ship and freight, while the cargo owner is compelled to contribute on its total value, has the effect, says M. *Cauvet* (§426), "to encourage captains to multiply sacrifices of the rigging of the ship, foreign captains taking advantage of the law as readily as the French."

HOLLAND.—The Dutch Commercial Code, sec. 727, provides that General Average shall be apportioned for Contribution, upon the value of the ship in the condition in which she arrived in her damaged state, adding thereto what is allowed by way of indemnity for General Average.

GERMANY.—The German General Mercantile Law, §718, declares the ship with its appurtenances contributes :

1. According to the value, in the condition in which it was at the end of the voyage, when the discharge was commenced.

2. With the amount taken as General Average on the ship and its appurtenances.

From the value No. 1, is to be deducted the existing value of the repairs which have been done, and of those articles which have been added since the occurrence of the casualty.

SWEDEN.—The Swedish Maritime Code of Feb. 23, 1865 provides §159. The vessel participates in the General Average according to—

1. The value of the vessel, after the damage has occurred, estimated by competent appraisers, appointed in accordance with §151; and,

2. The amount of the damage done to the vessel and its appurtenances, which, according to §152, is to be compensated for in General Average.

The damage ceases in the port where the vessel parts with her cargo, or in the port it may be necessary for the vessel to enter in order to repair.

NORWAY.—The Norwegian Maritime Code of March 24, 1860, provides :

§ 75. The vessel contributes according to its value in the condition in which it arrives in port, whether it be the port of refuge or of its destination, with the addition of the sum which, after the deduction mentioned in §74, has been made, is taken into General Average as a compensation for damage to the vessel and its appurtenances.

The value of the vessel is determined by appraisement, unless it be sold as wreck, in which case the sum received from the sale is to form the basis. In order to avoid the expense which may be occasioned by an ap-

praisement, it shall be allowable for the master and the consignee of the cargo to agree upon taking the value at which the vessel is insured, less the damage sustained, for a basis; or in case the vessel be not insured, then to agree upon some reasonable value.

ANTWERP.—General Averages are apportioned upon the value of the cargo, the half of the value of the ship, and the half of the freight, according to their values in the port of destination.

The value saved is the limit of Contribution. The ship-owner is not compelled to contribute beyond the value of his ship and the amount of freight, nor the proprietors of the cargo beyond the value saved of their merchandise.

ITALY.—The vessel, by Italian law, contributes on one half of her value, as follows :

Ship, estimated at	-	-	-	Livres 86,000
less repairs	-	-	-	28,000
				Livres 56,000

One half is - - - - - Livres 28,000

The above is from an adjustment made at *Genoa*, 1862.

Value of cargo for Contribution.

UNITED STATES.—When the Average is adjusted at the port of discharge, the practice is, to take the actual value of the cargo at the market price, stripped of all the

charges attached to it, as freight, duty and landing charges. And if a jettison have taken place, then the estimated proceeds of the goods jettisoned, taken in like manner, should be added to the net value of the cargo saved. The goods must contribute, according to their value, in the state in which they arrive at that place. The same rule is to be followed under similar circumstances for disbursements, if the goods arrive in a sound state, or if they were diminished in value by internal decay, or external damage, previous to the period at which the disbursements were made. But, if damaged goods be sold at the intermediate place to prevent their further destruction, the net amount for which they were sold at that place, after deducting their special charges, will be the sum for which they must contribute to General Average.

The value of the cargo, in fact, is, what it has produced, or would produce, at, as nearly as possible, the time of its arrival. If it be actually sold, there can be no truer value given for Contribution than the net proceeds of the sale—that is, the gross amount stripped of freight, duty and landing charges.

If the goods be not sold, an estimate must be formed of their value, and they must be treated in the same manner as if they had been really sold. This is called a *pro forma* account sale.

ENGLAND.—The rule in England is the same as that of the United States, as to value of cargo for Contribution. Goods contribute on their actual net value, i. e. on the market price at the port of discharge, free of all charges

for freight, duty and expenses of landing.

The value of goods jettisoned is to be added to the value of what arrives ; but to prevent mistakes in the adjustment, it is better to show the distinction between the two.

IN FRANCE, PORTUGAL and BELGIUM, the cargo contributes on its whole or real value at the port of discharge. *Cauvet* §426. *Rogron* 402. The French Commercial Code, art. 417, declares " The Contribution for the payment of the losses and damages, is made on the goods cast away, and on those saved, and on one-half the value of the vessel and freight, in proportion to their value respectively at the port of delivery."

And art. 421 declares: " The effects laden on the deck of the vessel contribute if saved. If they be thrown overboard or damaged by the jettison, the owner is not admitted to make a demand for Contribution ; his only remedy is against the master."

HOLLAND.—The Dutch Commercial Code, sec. 727, declares: General Average shall be apportioned for Contribution—Upon the value of the goods on board the ship at the time the loss occurred, or that were in the lighters or boats, or which, before the disaster, were jettisoned by necessity and reimbursed ; or that had to be sold in order to meet Average expenses.

Coined money shall contribute in General Average according to the exchange at the place where the voyage terminates.

Sec. 728. The laden cargo shall be estimated at its

value at the port of discharge, subject to a deduction for the freight, custom duties and costs of discharging, as well as of the Particular Average which may have happened to the same during the voyage.

This is subject to the following exceptions: When the statement or apportionment is made up at the place whence the vessel commenced its voyage in this country, or was to have commenced it, the price of the laden goods shall be fixed according to the value of the same at the time they were laden, with the costs till on board, exclusive of the insurance premium; and in case the goods may be damaged, according to their real value.

In case the voyage should be entirely given up, whilst in a foreign port, or the cargo be sold, and the Average could not be made up at that place, the price that the goods were worth on the passage, or the net amount at the place of sale, shall be taken as their contributory value.

Sec 729. The goods jettisoned shall be valued at their market price at the place where the ship is to be discharged, after deduction of the freight, custom duties and ordinary charges; the nature and condition of the same shall be determined by bills of lading, invoices and other documentary proofs.

Sec. 730. If the nature or quality of the wares were falsely stated in the bill of lading, and they have a greater value, they shall contribute on the basis of their real value if they be saved. But should they be lost by jettison, they shall be contributed for according to the quality they purport to have had by the bill of lading.

If the said goods be of an inferior quality to that mentioned in the bill of lading, they shall contribute on the basis of the quality stated in the bill of lading, if they be saved.

They shall be paid for on the basis of their real value in case they shall have been jettisoned.

Sec. 732. The goods for which the master has signed no bill of lading, or which do not appear on the ship's manifest, shall not be paid for if jettisoned; they shall contribute for the jettison if saved.

Sec. 733. The goods laden on the deck of the ship shall also contribute for the damage if saved.

If the master, without the knowledge or consent of the shipper, shall have placed the goods on the deck, and the same have been jettisoned, or have been injured by jettison, the shipper shall have a right to claim Contribution, without prejudice to an action by the parties interested against the ship and the master.

Sec. 737. If the loss of the goods should be caused by the fault or act of the charterer or consignee, they shall be made to contribute, nevertheless, to the General Average.

Sec. 739. If the owners of jettisoned goods should recover them after the apportionment is made, they shall restore to the ship-master or owners of the cargo what they may have received as indemnity by the apportionment, deducting the damage, costs and salvage.

The aforesaid restitution shall be apportioned between the ship and the parties concerned in the cargo, in the

same proportion that they contributed to the damage caused by jettison.

Sec. 740. The owners recovering jettisoned goods, and not claiming any indemnity, shall in no case be liable to contribute for any damage done to the other goods after the jettison.

GERMANY.—The German General Mercantile law, §720 declares,

The cargo Contributes :

1. With the goods still existing at the end of the voyage when the discharge was commenced ; or, if the voyage terminate by the loss of the ship, with the goods that have been brought into a place of safety, so far as at the time of the casualty these goods, in both cases, were on board the vessel or a lighter.

2. With the goods sacrificed.

§ 721. In estimating the amounts, the following points have to be taken into consideration :

1. With respect to goods which are undamaged, the market value, as fixed by competent persons, of the goods at the end of the voyage, when and at the place where, the discharge was commenced ; or, if the voyage be terminated by the loss of the ship, at the time and place of the salvage, after deducting freight, duties and other expenses.

2. With respect to goods which have been spoilt during the voyage, or have suffered damage not belonging to General Average, the value, as fixed by competent persons, of the goods in their damaged state at the time and place stated in clause 1 of this section, after deduc-

tion of freight, duties and other expenses.

3. With respect to goods which have been sacrificed, the amount of which they are estimated for General Average under § 713.—(Sec. 713, reads as follows: The amount to be allowed, for goods which have been sacrificed, is determined by the market price of goods of the same description and quality at the port of destination, at the time when the discharge of the ship was commenced. When no market price can be got, or when doubts may arise as to such price or its applicability, more particularly as regards the quality of the goods, the value must then be settled by competent persons. From the value, are to be deducted whatever sums, in respect of freight, duties and charges, have been saved by the loss of the goods.)

§ 722. If goods be thrown overboard and should be picked up, they have to contribute only to a General Average occurring at the same time or subsequently, in case the owner demands compensation.

Whether, and under what circumstances, provisions on board for passengers, or provender for animals, and consumed on the voyage, contribute to General Average?

UNITED STATES.—In practice, provisions, unless they form a part of the cargo, are put on board for consumption, and are exempt from Contribution.

In ordinary cases the provisions are a part of the ship, and the consumption of them is analogous to wear and tear.

In *Brown v. Stapleton*, 4 Bing., 119, a claim was made by the owner of a merchant ship for Contribution by provisions, which were shipped by the English government for the support of convicts, who were being transported. It was held that the claim could not be maintained, on the ground that provisions for the crew and passengers were not liable to contribute in any case. Mr. *Phillips*, in his Treatise on Ins. vol. 2, §1399, doubts the correctness of this decision. He says there is a plain distinction between a case where provisions are supplied by the ship-owner for the crew or for the passengers, and one where they are furnished by a shipper, to be consumed by passengers, or animals transported for him. Because, in the former case the value of the provisions re-appears in the freight, and by this Contribution is made.

In *Harris v. Moody*, 3 New York Reps. it was held that all property on board the vessel at the time of the jettison, and saved, unless attached to the persons of the passengers, is to be brought into Contribution.

IN ENGLAND, FRANCE, GERMANY, HOLLAND and BELGIUM, provisions put on board for consumption do not contribute. *Emerigon*, ch. xii., sec. xlii., *Meredith's* Ed. p. 493.

Animals to a market.

Contribute like other merchandise. This appears the rule in all countries.

Passengers' effects.

Passengers' personal effects and money do not contribute. This is the practice in the United States and in England, and we believe, in nearly all other maritime countries.

Passage money.

Passage money contributes to General Average if at risk. It is generally pre-paid, and if there be no express agreement to the contrary, must be refunded. If not to be refunded, it is at risk, and must contribute. In general, the law in relation to passage money is the same as that respecting freight. *Abbott on Shipp*, 378, 405, 503, note.

Crew's wages.

Do not contribute. Pothier on Maritime Contracts. Cushing's ed. p. 72, n. 126; Emerigon, ch. xii., sec xlii; *Consolato del Marc*, c. 281. 293.

Crew's effects.

Do not contribute.

Government property,

UNITED STATES.—Government property was once considered as exempt from Contribution. 1 *Magens*, 172. but it is not now exempt. *United States v. Wilder*, 3 Sumner, 308.

ENGLAND.—Government stores contribute like other goods; but, in general, on cost price, as they are not shipped for profit. *Brown v. Stapyleton*, 4 Bing., 119.

Profits on cargo.

Profits do not contribute under that name. It is obvious, however, that, when the contributory value of the goods, is their value at the port of destination, it is their value as enhanced by the transportation, and therefore the profits are included in fact. *The Nathaniel Hooper*, 3 Sumner, 542.

Bank notes.

UNITED STATES.—Bank bills transported for hire become part of the regular cargo of the vessel, and, as such cargo, are liable to contribute to the General Average loss. *Harris v. Moody*, 3 N. Y. Reps., 286. It was also held by the same court, that, Bank bills are to be regarded as property, the goods and chattels of the owner thereof; and in case of loss, the owner is entitled to recover the nominal or par value thereof, in the absence of

any proof of depreciation, with the interest thereon.

ENGLAND.—Contribute—Money, bills of credit, choses in action, &c., are excepted only when carried like clothes and luggage under the personal care of a passenger or seaman. *Peters v. Milligan*. Park on Ins. 211. *Millar*, 244. *Thanas v. Royal Ex. Ass. Co.*, Man. Dig., 164, n. i., No. 5.

FRANCE.—Contribute to the General Average. *Emerigon on Insurance*, Meredith's Ed., 492, 497.

Value of freight for Contribution.

UNITED STATES.—The net freight only on the goods saved and carried, is called upon to contribute. This net freight is the amount earned, after deducting crew's wages, port-charges &c. This net freight is usually ascertained, in practice, by deducting a certain proportion from the gross freight. In New York, Virginia, Georgia, Texas and California, the practice is to deduct from the gross freight one-half; In Massachusetts, Maine, Maryland, Pennsylvania and Louisiana, one-third.

Only the freight earned pays. *Lee v. Grinnell*, 5 Duer, 400, 431. If there be a *pro rata* freight only, that, only, contributes. The *Nathaniel Hooper*, 3 Sumner, 542; *Maggrath v. Church*, 1 Caines, 196. Whatever freight the ship loses by jettison of the goods, or by any sacrifice, is to be contributed for, *Nelson v. Belmont*, 5 Duer, 310, 322. So if she be voluntarily stranded to save the cargo, and being lost, cannot carry it on and earn her freight, this is part of the sacrifice. *Col. Ins. Co. v.*

Ashby, 13 Peters, 331, 344. When freight is entitled to contribution, the value is the gross freight lost by the sacrifice. Pending freight contributes and receives if the vessel be totally lost. *Col. Ins. Co. v. Ashby*, 13 Curtis, 176.

The following are examples showing Contributory value of freight in certain cases. Gross freight estimated at \$5,000.

1st. *When a jettison has been made.*

<i>Freight on goods delivered</i>	- - -	\$3000, $\frac{1}{2}$	1,500.
<i>Freight Contributed for</i>	- - - - -		2,000
			\$3,500

2d. *Where other sacrifices or expenditures have been made.*

<i>Freight on goods delivered</i>	- - - -	\$5,000 $\frac{1}{2}$	2,500
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3d. *When the vessel is totally lost, but cargo delivered.*

<i>Freight gross</i>	- - - - -	5,000	
<i>Off expenses of delivering cargo by</i>	}	4,000	
<i>other vessels</i>			
			1000 $\frac{1}{2}$ \$500

Where the expenses of delivering cargo exceed the original freight, there is no contribution by freight, but the excess is chargeable to cargo, and apportioned according to bulk.

In the above examples the deduction of one-half is made according to the New York rule, simply as an illustration. In Boston and other places, as we have seen, the deduction would be of one-third.

ENGLAND.—The value of freight for contribution is the amount the ship earns, stripped of the captain's and crew's wages for the voyage, brokerage, harbor and light

dues, and all incidental expenses. The victualling of the crew is, however, not deducted; the reason for the exception is, that the crew's provisions are ship's stores, and included in the value of the ship.

In FRANCE, PORTUGAL and BELGIUM, the freight contributes for one-half, as in New York and some other places in the United States.

In HOLLAND, the wages and provisions for the crew are deducted.

In GERMANY, the freight contributes on two-thirds of the gross amount earned.

In ITALY, one half the freight at risk contributes.

In SWEDEN, NORWAY and ANTWERP, the freight contributes on one-half of the amount earned.

Value of freight for Contribution, on ships chartered out and home by one charter.

Charter-parties are generally worded, so much to be considered earned upon the delivery of the *outward* cargo, and the balance on the delivery of the *homeward* cargo. If no agreement or division of the charter be thus made in the written instrument, it is the custom of adjusters in New York, to estimate the amount at risk at the time, which is usually computed to be, one-half on each passage.

The authorities are diverse and conflicting. In the case of *Shelton v. Brig Mary*, U. S. D. C. Mass., 5 Law Reporter, 75, it was decided, that if there be a charter-party and the freight to be paid for the round voyage

out and home, and the principal object of the voyage be to obtain a return cargo, if a loss occur on the outward voyage, the freight for the round voyage contributes.

In the case of *Williams v. The London Ins. Co.*, 1 Maule & Selw, 318, it was held that the whole freight for a voyage to India and back to London, should contribute towards an Average which occurred on the outward voyage. This result was reached through the medium of a charter-party, by which no freight was payable until the voyage was completed, and the court attached much importance to the fact, that the whole voyage was performed. Whether the outward cargo was held to contribute does not appear in the report of the case.

Mr. *Hughes* says, in his Treatise on Ins., 298: "If the ship be chartered for a voyage out and home, and meet with an accident on the outward passage, which gives rise to an Average claim, the whole freight when afterwards received under the charter-party, for the outward and homeward voyages, must contribute to the loss."

These decisions, and this diction proceed on the ground that it is competent to disregard the actual freight on board at the time an Average loss occurs, and to consider future earnings to be freight pending if there be a written contract therefor. Mr. *Arnould* does not approve the decision in *Williams v. The London Ins. Co.* and doubts whether it can be supported on principle, 2d *Arnould*, 938, and he says, page 937, "That freight in order to be Contributory at all, must have been pending at the time of the sacrifice."

Mr. *Benecke*, after citing the *Williams* case, dissents from it, and says, that, in his opinion, the freight in such cases ought to be divided, and Mr. *Phillips*, in a note, intimated that in his judgment, only the freight of the particular passage should contribute. *Stevens & Benecke* by *Phillips*, 258.

Mr. *Phillips*, in the last edition of his treatise, chap. 15, sec. 11, states the rule as follows: "The freight pending at the time of the jettison or other sacrifice contributes for the loss on the amount actually saved."

In the case of *Spofford v Dodge*, 14 Mass., 66, it was held that "each party should contribute according to the real value and amount of his interest without regard to the particular contracts relating to the voyage." The vessel in this case, was under charter on time, and the freight was less than the charter-money, yet the court confined the contribution to the freight, on the express ground, that the difference arose from a special contract which could not affect the result.

ENGLAND.—If a ship be chartered out and home, in one charter, and she meet with a General Average on the outward voyage, the whole freight for the round voyage must contribute. If the Average happen on the homeward voyage, then only the freight at risk at the time is to pay its contribution.

FRANCE.—As per arbitration for the value of freight.

Advances on account of freight.

UNITED STATES.—It is stated by some able text-writ-

ers, that if freight were paid in advance, and not to be repaid in any event, this was not at risk, and should not therefore be required to contribute. 2nd *Parsons*. 330; *Stevens & Benecke* on Av. Phillips Ed., 210, 257; 2 *Phillips on Ins.* §1404.

In practice, it is a disputed question. The most just and practicable rule would be, that the Contribution should not be affected in the least by any particular unusual stipulations as to the time of payment of freight, but should be made precisely as if the goods had been shipped on the usual bill of lading, stipulating to pay the freight on the delivery of the goods, estimating the freight on each passage distinctly, whether the parties agree for freight on the termination of successive passages, or partly in advance, or however otherwise they may agree. This rule would operate more equally in a great majority of cases, and save third parties from being affected by unusual stipulations of which they could not be apprised.

ENGLAND.—It has been commonly maintained, hitherto, that advances of money made to a captain on account of freight are not to contribute to General Average. But in the recent case of *Hall v. Janson*, in the Court of Queen's Bench, it was held that a custom alleged to exist in London that assurers of money advanced on freight were not liable to make good a General Average loss, was no answer to the action. What the nature of an advance to the captain before the ship's sailing is, depends almost entirely on the manner of making it. If it be simply an advance for expenses, it is not an insurable interest in the eye of the law, but a per-

sonal debt of the owner not dependent on the safety of the ship. If, however, it be clearly stated to be advanced *as part of the freight*, it is insurable as such : for, in case the ship be lost, that freight paid in advance is lost also, for it would not be returned by the shipper. In fact it might be put in the light of the person so advancing, having purchased a share of the freight ; and therefore the owner has no right to insure the portion advanced, for, *the same interest in all its rights* cannot be insured twice.

The current opinion about this subject at Lloyd's appears to be just contrary to the fact, for it is commonly stated that advances, *eo nomine*, are an insurable interest, *but that money advanced on account of freight is not insurable* by the merchant or his agent ; in conformity to which opinion, advances are very usually insured in London and elsewhere. But the truth is discoverable by deciding the question, whose is really the risk of loss by sea perils on these advances ? On whomsoever that contingency rests there remains also the right to provide against it by insurance ; in other words he has insurable interest. Moreover, if that interest be such as to be subject to danger of loss, it is interested in any means taken to avoid such loss,—it must contribute to General Average. *Hopkins* 83. *Arnould* 261.

Whatever may have been the course of the English decisions, the law is now well established in the United States, that freight paid in advance may be reclaimed and recovered in a case of non-performance of the voyage without fault of the shipper, unless there

be a special agreement to the contrary. *Watson v. Duykink*, 3 Johns, 335; *Phelps v. Williamson*, 5 Sandf., 578; *Pitman v. Hooper*, 3 Sumner, 50; *Reina v. Cross*, 6 Cal., 29; *Griggs v. Austin*, 3 Pick., 20; *Lawson v. Worms*, 6 Cal., 365; *Brown v. Harris*, 2 Gray, 359.

When freight is at the risk of the ship-owner, it is clearly interested in measures taken for the common benefit, and should contribute; of this there can be no doubt. But when the understanding between the shipper and ship-owner is, that the advance is a payment absolutely without the right of reclamation, the insurable interest is vested wholly in the shipper of cargo, and the ship-owner not having any interest at stake, so far as concerns the freight pre-paid, has nothing to lose, and it is therefore doubtful whether he can be made to contribute to General Average.

Freight when the goods are transhipped by another vessel.

UNITED STATES.—According to the practice in New York, one-half of the freight earned, which would be the original freight less the cost of transshipping cargo, contributes to the General Average.

ENGLAND.—The excess of freight over transshipping freight and extra charges consequent, contributes.

FRANCE.—The freight as estimated by arbitration.

Specie in ordinary cases.

IN the UNITED STATES, ENGLAND and FRANCE, specie contributes at its full value.

HOLLAND.—The Dutch Commercial Code, § 727, provides that “coined money shall contribute to General Average according to the exchange at the place where the voyage terminates.”

Property recovered after jettison.

UNITED STATES.—If goods be jettisoned, and afterwards recovered, not their whole value, but only so much thereof as is lost by the jettison and damage thence arising, added to the expense of recovering them, is to be contributed for.

ENGLAND.—Goods jettisoned still belong to their former owners, and if recovered from the sea, may be reclaimed on paying the expenses of salvage, and Contribution is made in the same manner as in the United States.

FRANCE.—The Ordinance, art. 22, tit. *Du jet.* says: “If the effects jettisoned be recovered by the owners after Contribution, they shall be bound to return to the master and those interested, what they have received in the Contribution, less the damage still remaining to them from the jettison and the expenses of the recovery.”

HOLLAND.—If the owners of jettisoned goods should recover them after the apportionment is made, they shall restore to the ship-master or owners of the cargo

what they have received as indemnity by the apportionment, deducting the damage, costs and salvage.

The aforesaid restitution shall be apportioned between the ship and the parties concerned in the cargo, in the same proportion that they contributed to the damage caused by jettison. *Dutch Com. Code*, sec. 739.

GERMANY.—If goods be thrown overboard, and should be picked up, they have only to contribute to a General Average occurring at the same time or subsequently, in case the owner demands compensation. *German Gen. Mer. Law*, sec. 722.

Property sacrificed on first General Average.

The practice in the UNITED STATES and ENGLAND is, that property sacrificed on the first General Average, contributes to all subsequent General Average.

Mr. *Benecke* in his *Prin. of Indem.*, p. 306, London ed., 1824, says: "jettisoned goods continue liable to Contribution until the risk terminates, because, being entitled to a Contribution for their whole value on the arrival of the ship, their whole value is at risk until such arrival."

In *Nelson v. Belmont*, 5 Duer, 310, the court said, "the goods jettisoned do not contribute for any damage afterwards done to the residue of the cargo."

FRANCE.—Property sacrificed on the first General Average, does not contribute to further General Average. *Rogron*, 425.

Cargo on deck.

UNITED STATES.—Deck-load, though ordinarily not contributed for in General Average when sacrificed, must contribute for the sacrifice in addition to its own special expenses or charges.

Deck-load, as we have previously seen, is usually at its own risk, and must pay its own charges; these are called special charges, and must be deducted from the net value before contributing to the General Average.

ENGLAND.—Deck-load contributes, and, in practice, when carried according to usage and custom of trade, is also contributed for; but General Contribution is not binding on the underwriter, unless his consent to risk of deck cargo have been specially obtained.

FRANCE.—In practice, deck-load does not contribute except in short coasting voyages.

Code de Commerce, art. 421, provides: "The effects laden on deck of the vessel contribute if saved. If they be thrown overboard or damaged by the jettison, the owner is not admitted to make a demand of Contribution; his only remedy is against the master."

HOLLAND.—The goods laden on deck of the ship shall also contribute for the damage if saved.

If the master, without the knowledge or consent of the shipper, shall have placed the goods on the deck, and the same have been jettisoned, or have been injured by jettison, the shipper shall have a right to claim Contribution, without prejudice to an action by the parties interested against the ship and master. *Dutch Com'l Code*, § 733.

Liability of underwriters as to General Average.

The laws and policies of insurance of *all nations* oblige the underwriters to indemnify the assured for Average Contributions, with this difference, however, that in some countries the underwriters are not liable unless the General Average exceed a fixed per centage, whereas in the UNITED STATES and ENGLAND they compensate for every loss of that kind, however small. In ANTWERP, AMSTERDAM, ROTTERDAM, HAMBURG, BREMEN and LUBECK, the underwriter pays General Average only where it amounts to three per cent. of the sum insured; in BORDEAUX, the excess of one per cent.; in PARIS, ROUEN and HAVRE, the excess of one per cent., in any long voyages, and the excess of two per cent. in coasting voyages; in MARSEILLES, the excess of one per cent., upon gold and silver, and the excess of three per cent. upon all other merchandise; in NANTES, the excess of three per cent., reduced to one, when there are Particular Averages also; in TRIESTE, the excess of three per cent., of five and fifteen, according to the objects insured and the voyage; in GENOA and LEGHORN, the excess of three per cent.

The *English East India Company*, when they charter a ship, stipulate that there shall be no claim for Contribution for General Average. A loss of this description consequently falls entirely upon the ship, freight and private trade, and it is customary to provide for this in policies upon those subjects. According to the stipulation, no connection exists, with regard to the perils of the navigation, between the cargo of the com-

pany, and the ship, freight and private trade. It follows, therefore, that the company cannot be entitled to compensation by way of General Average for property of theirs thrown overboard, unless there be a stipulation to the contrary.

In regard to the adjustment,—it may be noticed, that errors sometimes occur in recovering a General Average loss, of the underwriters, in consequence perhaps of a want of facility in appropriating adjustments of this nature to a policy of insurance ; or for want of bearing in mind that the valuation in the policy has no relation to the value for Contribution.

ADJUSTMENT.

At what place ought the Average to be adjusted?

UNITED STATES.—The proper time and place for adjusting a General Average loss, is on the arrival of the ship at her port of destination. There the proprietors or representatives of proprietors, of all the property will be found ; there a uniform scale of value can be adopted as the basis of Contribution ; and there the means will exist for enforcing payment should any of the contributors resist the claim for their quota.

In *Loring v. Neptune Ins. Co.*, 20 Pick., 411, it was held, that an adjustment and settlement of General Average at the port of destination binds the parties,

though it may be made on principles different from those which govern where the policy was made.

In *Barnard v. Adams*, 10 Howard, U. S. Sup. Ct. R., 270, 307, the court said: "The place where Average shall be stated, is always dependent more or less on accidental circumstances, affecting, not the technical termination of the voyage, but the actual and practical closing of the adventure."

Judge *Phillips* says: "Where different parties are concerned in a General Average, the jurisdiction of the adjustment is at the port of delivery, at which their interests are to be separated." 2 *Phillips*, § 1,413.

M. *Parsons* seems to take the same view. Referring to the foregoing rule laid down by *Phillips*, he says :

"This, indeed, is the port of destination for those goods which are to be delivered there. And the rule would be the same in substance, if it were that the adjustment should be made at the first port of delivery of any of the interests concerned." 1 *Parsons*, 332.

Though, as we have said, it is customary where the vessel arrives at her port of destination, and delivers her cargo there, that the loss should be adjusted at that place, and in conformity with the rule there prevailing ; still it does not follow that it is not competent for an adjustment to be made in any other port. It is well settled that the master has the power, and, indeed, it is his duty, not to deliver any contributory goods to their owners until their share of Contribution is paid or secured to him for the benefit of the party to whom it belongs. This implies and requires a previous adjustment ; and there can hardly be an adjustment in part

of anything of which all the elements are so closely connected and independent. It follows, therefore, that the rule in practice should be as stated by Judge Phillips.

If the occurrence which gives rise to the General Average, happen in the early part of the voyage, and occasion the return of the ship to her port of sailing, or some other port accessible to the owner and shippers of the cargo, it is often convenient that the General Average Contribution should be made there, and not delayed till the vessel's arrival at her destined port. And when this is done by the consent of all the parties in interest, it will be binding, but not otherwise. In this instance a different value must be set on the contributory interests. It will be the cost of all of them at the time of sailing, less any diminution of value by the accident or sea damages. And although this is not strictly the correct method of valuation, there is little to object to it, since all the interests are subjected to the same treatment. As to the freight, an exception is made in its favor, and an estimate is made of what it would produce *net* when the voyage shall have been completed.

ENGLAND.—The proper place for adjusting a General Average is that of the vessel's destination after her arrival. The amount of damage as well as of the interest to be contributed for, can be better ascertained there than at any other place, especially when the value of the articles at that place is the basis of the Contribution. Moreover, the consignee of goods is always obliged to pay his share of the Contribution,

and can be compelled to do so by the master, who has it in his power to demand security before he parts with the goods. On the other hand the shipper cannot be under all circumstances obliged to pay General Average, after the goods have been delivered. Lastly, when the parties interested belong to different nations, it is necessary that the General Average should be adjusted according to the laws of the place of discharge, because those laws are the only ones which the authorities can, without inconvenience, put into execution, and all parties are bound to submit to them.

When a vessel returns to the place or country from which she departed, and continues her voyage, it will always be advisable to adjust the General Average at the place of departure. The parties cannot object to it, as far as regards disbursements, because every one is obliged to pay his share to them at the place and time at which they are required. The case admits of a doubt with respect to jettison, to which the parties cannot be liable to contribute before the vessel has reached her destination, because no Contribution can be demanded if the ship and cargo be totally lost before the voyage is completed.

It may, therefore, be considered as a general rule, that a General Average must be adjusted at the place of discharge after the ship's arrival, if it be practicable, and it is one of the duties of the captain to see the losses and disbursements adjusted there by General Contribution. *Benecke*, 269; *Emerigon* II, c. 19, sec. 15; *Roccus*, n. 96; *Casaregis Disc.* 46, n. 64; *French Ord.*

Tit du jet, art. 6; *Code*, art. 414; *Hamburg, Ord. Tit 2*, art. 6.

As to the liability of underwriters to pay General Average according to foreign adjustment.

UNITED STATES.—The authorities are diverse and conflicting.

Insurance being a contract of indemnity, the underwriter ought to indemnify the assured for the whole amount of Contribution which he was legally obliged to pay. This amount may be either greater or smaller than it would have been, if adjusted according to the rules established in the country where the insurance was made, but there will be no perfect indemnity in either case, unless the assured receive back the sum which he was under the necessity of paying.

The proper way, therefore, to do justice to all parties, seems to be, to accept, as conclusive, foreign adjustments, in all cases, when made strictly in accordance with the laws and usages of the place of adjustment, and accompanied by proofs of settlement in full faith there.

Judge *Parsons* (Mar. law, vol. 2, p. 431), expresses his views as follows: "It has also been said that an adjustment of General Average, made at a port where it ought to be made, and made according to the laws of that port, binds conclusively all who are parties to it. This is certainly true, so far as relates to the original parties to the Average, or to the owners of the several sacrificed or contributory interests. But when this question comes up in reference to them who are only indirectly interested, by insuring those who are so,

directly, it assumes a somewhat different aspect. The contract of insurance is made between parties, one of whom at least, and that the promising party, has a permanent location; there he enters into the contract, and makes his promise. And has he not the right to have it construed and applied, in all respects, by the law of the place where the contract is made and is to be performed? If a New York ship, bound to Calcutta, be insured in London, and incur great expense by seeking a port wherein to repair damage caused by a sea-peril, there may be three laws or rules, by which to determine how much the ship, or the insurer of the ship, shall pay. The law of New York, for example, in respect to the wages and provisions and expense of repair, may be one thing, that of London another, that of Calcutta a third. And if we admit, as is certain, that an adjustment made on arrival at Calcutta will bind the ship's cargo and freight, when the ship-owner comes to London to obtain indemnity from the insurers, may they not say, 'we insured you under the law of England; by that law the loss of the ship would have been far less than it is by the adjustment at Calcutta. This difference must be your loss, because we shall pay you by the law of London.' It is not to be denied that there is some plausibility in this view, and that it is sustained by respectable authority. We cannot, however, doubt that the opposite rule is the true one; and the weight of authority, as well as of reason, would hold the insurers as among the parties upon whom a foreign adjustment, properly made, where made, is binding. The contract of insurance is eminently a maritime con-

tract. It goes with the ship. The insurers can calculate the risk, for the policy is made upon a designated voyage, or upon time, or with a liberty of procedure agreed upon, and the insurers ought, by a familiar principle of the law-merchant, to be governed by the law of whatever places becomes applicable to the interests insured in the course of the voyage or of time. The fault is in the diversity of these rules; this is less than it was; and the present strong tendency of the law-merchant to vindicate itself as a part of the *jus gentium* and to cast off local peculiarities, permits the hope that this, and some similar questions, will disappear."

In the following cases it has been decided that an adjustment made at a foreign port is not binding on an insurer. *Thornton v. U. S. Ins. Co.*, 3 Fairfield, 150; *Lenox v. United Ins. Co.*, 3 Johns Cas., 178; *Shiff v. La. State Ins. Co.*, 18 Mart. La., 629. And it has been held that it was so binding in *Strong v. N. Y. Firemen's Ins Co.*, 11 Johns, 323; *Depau v. Ocean Ins. Co.*, 5 Cow., 63; *Loring v. Neptune Ins. Co.*, 20 Pick., 411. The question was discussed by Mr. Justice Story, with his usual learning and ability in the case of *Peters v. Warren Ins. Co.*, 1 Story, 463, and a strong opinion expressed in favor of the latter view of the case, though he expressly stated that he did not wish to be understood as deciding the point.

The rule in practice, in New York and Boston, is to accept foreign adjustments, when correctly adjusted according to the laws and usages of the foreign port, as conclusive, not only between all the parties directly interested in the adventure, but also, as between the

assured and the underwriter.

ENGLAND.—In delivering the opinion in *Simonds v. White*, 2 B. & C., 805, *Abbott*, C. J., said: “The shipper of goods, tacitly, if not expressly, assents to General Average as a known maritime usage, which may, according to the events of the voyage, be either beneficial or disadvantageous to him. And by assenting to General Average, he must be understood also to assent to its adjustment, and to this adjustment at the usual and proper place; and to all this, it seems to us to be only an obvious consequence to add, that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made.”

Mr. *Hopkins* states the English practice as follows: “In some countries the Contribution is arranged and settled authoritatively by tribunals of commerce or official *Despatcheurs*. But the question which arises, is, whether, when ships, goods or freight have been insured in England, the underwriters are bound by those foreign settlements. There is, or I should, perhaps, rather say, there was, a strong conviction to the contrary. It was known that, by most foreign adjustments, the column of General Average comprehended items which would be disallowed by our own custom; and that, therefore, insurers of ships sometimes, and the insurers of goods nearly always, are prejudiced by admitting a foreign statement as binding on themselves. That this was the case, is shown by the practice which gained ground with many shippers, of introducing into their policies, the condition, that in case of General Average, the under-

writers should pay according to the foreign statement. The introduction of the clause is plainly indicative that underwriters were not bound to notice foreign adjustments, without the proviso. The motive for introducing the words is sufficiently obvious; for proprietors of cargo are themselves obliged to pay Average according to the laws and regulations of the foreign port which generally makes their Contribution greater than it would be by a re-adjustment made in our own country, and consequently they have themselves to sustain the loss of that part which they cannot recover on their policy by an English statement. The underwriters argue, and very plausibly, that the undertaking called the policy is an instrument which binds by the laws and customs of the place where it is made; by those laws and customs it is to be construed, and by them only. Some of the assured hold, on the contrary, that the mere *jus loci* of the contract is not to circumscribe their indemnification; that it is in accordance with the spirit which animates the system of insurance, that they should have, under a policy, an *ample* indemnity against all risks; that variation in the laws which, in foreign countries, regulate Average Contribution, is one of the risks; and that as the insurers know the port to which the ship is bound, they must take that contingency into account in fixing their premium. Impressed by the force of such an argument, underwriters have in many instances of late given way to it, and have paid Average on foreign adjustments upon this special

reason, that, had they been requested, they would have introduced the foreign General Average clause into the policy without asking any additional premium, and it therefore becomes a matter almost of indifference whether it be introduced or not. *Arnould* effectively decides against my view, in payment on foreign statements. He says an English underwriter is bound by a foreign adjustment *when rightly adjusted according to the laws and usage of the foreign port*; but unless it can be clearly proved that it was in strict conformity, he is not bound. He relies on two cases cited by Park, *Newman v. Cazlet*, and *Walpole v. Ewer*. The latter seems to have been decided against the defendants on a technical point; for Lord Ellenborough said that there must be an allegation of the fact as to law and usage, but here the declaration contained none. Sir J. *Arnould* then continues, "it appears an almost unavoidable inference from these expressions of Lord Ellenborough, that where ships and goods are insured for a voyage from this country to a foreign port, and sufficient evidence is given of an invariable usage at such port to adjust as General Average, losses which are not so in this country, the English underwriter is bound thereby, on the ground that he must be taken to have notice of the usage prevailing at the foreign port to which the contract of insurance relates, and by reference to which it ought to be construed. He must have contemplated the possibility of the interest having to pay Average in a foreign country." *Arnould on Ins.*, p. 944.

Now it will be observed, that in these remarks of the learned writer on Insurance, two things are involved :— First, that in an action against an underwriter for recovery of the sum contributed by a foreign Average adjustment the burthen of proof lies with the plaintiff to show that the adjustment has been made up in strict conformity with the law and usage of the place. And if the adjustment have been made up in strict conformity with the law and usage of the place, and if the adjustment have been made in a place little known or not much frequented, and the defendant should traverse and allege that the adjustment is not in conformity, &c., and so put the plaintiff on his proofs, it might be highly difficult to bring the necessary evidence, and it might even require that he should send a commission to that foreign place to establish the fact; the expense of doing which might deter him from proceeding. No one asserts that an underwriter is bound by even an English adjustment unless it be a correct one; but supposing the foreign adjustment be correct, this writer decides that it is binding on the underwriter. And he justifies this decision by an argument, in the second place, which is of large application, viz: on the implied notice which the underwriter is taken to have of the prevailing law and usage of Average in every port and place which is the *terminus ad quem* of any voyage a ship, which he insures, may be on. Now, were this principle applied to every other circumstance relating to an insurable interest about which there is the possibility of the underwriter's procuring information for himself, *i. e.*, about which he is taken to have notice, it appears to me that he would rarely be in

a position to defend himself in any case of *suppressio veri* or of misrepresentation. The value, however, taken in foreign statements is not held to be binding on the English underwriter who has even agreed to the foreign Average clause, or who interprets his liability most liberally. He will pay only on a value within, or co-extensive with, the value insured; for it would be irrational to suppose that a shipper who only partially insures his goods should have all the benefit which he might have secured if he had paid for an insurance on the full amount of his interest."

In HAMBURG, the insurance companies are bound by their own fundamental rules to submit to foreign adjustments of General Average, made by persons duly authorised for that purpose. The same rule as far as we are able to learn, is followed in all other foreign countries, unless there be a stipulation to the contrary in the policy, as is the case in those of the insurance companies at *Paris*.

By whom adjustments are made.

UNITED STATES.—Adjustments are usually made by persons who make this their special business.

The traditional and necessary attitude of an adjuster is that of a judge, and not that of an advocate or attorney. It is his duty, in all cases, to act impartially between insurers and insured, regardless of favor towards friend or employer, and intent solely upon the legal and clerical accuracy of his calculations.

ENGLAND.—Formerly, before commerce had expanded into its present gigantic proportions, the assured used to make up his own claim, or get some more experienced neighbor to do it for him. Afterwards, certain persons doing business at Lloyd's became esteemed for their knowledge and experience in such matters, and to them were entrusted many of the claims to get settled, until, about fifty years ago, the business of making up adjustments was combined with that of an insurance broker; but at that period there was sufficient business to establish Average adjusting as a separate profession. The persons who devote themselves to this profession are called Average Adjusters, or Average Staters. In the majority of cases they decide the questions which emerge, and they make the numerous calculations which are involved in claims on goods. The position of the Average stater is not official or authoritative; and both underwriter and assured are at liberty to dissent from his decisions, and raise questions on each separate case.

FRANCE.—The Commercial Code of France provides, (art. 414) that "the statement of losses and damages is made out in the place of the discharge of the vessel, at the instance of the master, by referees.

The referees are appointed by the tribunal of commerce, if the discharge be made in a French port.

In places where there is no tribunal of commerce, the referees are appointed by the justice of the peace.

If the vessel be discharged in a foreign port, they are appointed by the French consul, and where there is no French consul, by the magistrate of the place.

The referees are to be sworn, before they enter upon their business.

HOLLAND.—The Dutch Commercial Code, sec. 724, provides: "The statement and apportionment of General Average shall be made up at the request of the captain and by experts, who shall be appointed by the interested parties, or by the district court of the place within the kingdom where the said statement and apportionment are to be made up.

The experts shall be sworn before they commence their duties.

The statement shall be ratified by the district court.

In foreign ports the General Average shall be made up by the local authorities of that place."

Sec. 725. "In case of a voyage being given up on the passage, or of the sale of the cargo in a port of refuge, both occurring beyond this country, the claim, statement and apportionment of the damage shall be made at the place where such voyage is given up, or where the sale takes place."

GERMANY.—The German General Mercantile law declares: §731 "Under the jurisdiction of this code, the Average statement is to be made up by the persons regularly appointed for the purpose, or, in their absence, by parties especially authorised by the court (Average stater) (compare §57, clauses 1-7 of the Introductory Law.)

Every party interested is bound to furnish the Average stater with all documents necessary for making up the statement as far as they may be under his control, viz: charter-parties, bills of lading and invoices.

To the laws of the respective countries is reserved the

right of making further regulations respecting the drawing up of the Average statement and the settling of the same."

"§57. *Introductory Law.*—The following regulations are hereby laid down for the stating and settling of Averages :

1. As soon as the Average statement is made up, the Average stater shall lay the same before the court of commerce. It is the duty of this court to examine the statement, and if mistakes or omissions be found, to have the same corrected by the Average stater.

2. After the statement has been examined, and, if necessary, corrected, the parties who have to contribute, if they have announced themselves to the court, or are known in other ways, more particularly by the ship's papers or cargo accounts, are to be invited to appear before a deputy of the court on a fixed day if they reside in the district of the court, or have appointed representatives there, otherwise, in the person of an official agent, who will be appointed to act for them, in order to make their several objections to the statement.

To the summons is to be attached the announcement, that any party not appearing will be considered to have no objection to make to the statement.

3. If, at the stated time, no objections be made to the statement, then the court shall confirm the same.

4. If an interested party make objections, he must prove them in the sitting appointed, or must reserve the right of putting in a written statement of his grievance. In the latter case, the statement must be laid before the

court within fourteen days ; if this should not be done, it will be considered that the official record of the sitting is to serve as such statement.

The ordinary legal steps will be taken by the court on the statement of grievance ; or should such not have been reserved, or not have been put in during the interval of fourteen days to be allowed as above, then on the copy of the official record of the sitting which is to serve as a statement.

5. When the objections which may have been brought forward have been settled by a legal decision, or otherwise, then the court shall proceed to confirm the Average statement, the same having first been duly amended in conformity with the settlement of the objection.

6. When objections are raised which affect a portion of the Average statement only, the court shall at once confirm the statement so far as the same is not affected by the objections.

7. When the Average statement has been so confirmed, immediate execution may be granted upon it.

CHAPTER II.

INTERNATIONAL GENERAL AVERAGE.

*The following is the bill recommended to be adopted by
the International Congress held at York, in
England, on the 25th, 26th and 27th
days of September, 1864.*

JETTISON OF DECK CARGO.

“Section 1. A jettison of timber or deals, or any other description of wood cargo, carried on the deck of a ship in pursuance of a general custom of the trade in which the ship is then engaged, shall be made good as General Average, in like manner as if such cargo had been jettisoned from below deck.”

“No jettison of deck cargo, other than timber or deals, or other wood cargo, so carried as aforesaid, shall be made good as General Average.”

“Every structure not built in with the frame of the

vessel shall be considered to be part of the deck of the vessel."

DAMAGE BY JETTISON AND BREAKAGE.

Section II. Damage done to goods or merchandise by water which unavoidably goes down a ship's hatches opened, or other opening made, for the purpose of making a jettison, shall be made good as General Average, in case the loss by jettison be so made good."

"Damage done by breakage and chafing, or otherwise, from derangement of stowage consequent upon a jettison, shall be made good as General Average."

EXTINGUISHING FIRE ON SHIPBOARD.

"Section III. Damage done to a ship or cargo, or either of them, by water or otherwise, in extinguishing a fire on board the ship, shall be General Average."

CUTTING AWAY WRECK.

"Section IV. Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea peril, shall not be made good as General Average."

VOLUNTARY STRANDING.

“Section V. When a ship is intentionally run on shore because she is sinking or driving on shore or rocks, no damage caused to the ship, the cargo and the freight, or any or either of them, by such intentional running on shore, shall be made good as General Average.”

CARRYING A PRESS OF SAIL.

“Section VI. Damage occasioned to a ship or cargo by carrying a press of sail shall not be made good as General Average.”

PORT OF REFUGE EXPENSES.

“Section VII. When a ship shall have entered a port of refuge under such circumstances that the expense of entering the port is admissible as General Average, and when she shall have sailed thence with her original cargo or a part of it, the corresponding expenses of leaving such port shall likewise be so admitted as General Average; and whenever the cost of discharging cargo at such port is admissible as General Average, the cost of reloading and stowing such cargo on board the said ship, together with all storage charges on such cargo shall likewise be so admitted. Except that any portion of the cargo left at such port of refuge, on account of its being unfit to be carried forward, or on account of

the unfitness or inability of the ship to carry it, shall not be called on to contribute to *such* General Average."

WAGES AND MAINTENANCE OF CREW IN PORT OF REFUGE.

"Section VIII. When a ship shall have entered a port of refuge under the circumstances defined in section VII, the wages and cost of maintenance of the master and mariners, from the time of entering such port until the ship shall have been made ready to proceed upon her voyage, shall be made good as General Average. Except that any portion of the cargo left at such port of refuge on account of its being unfit to be carried forward, or on account of the unfitness or inability of the ship to carry it shall not be called on to contribute to *such* General Average."

DAMAGE TO CARGO IN DISCHARGING.

"Section IX. Damage done to cargo by discharging it at a port of refuge shall not be admissible as General Average, in case such cargo shall have been discharged at the place and in the manner customary at that port with ships not in distress."

CONTRIBUTORY VALUES.

"Section X. The contribution to a General Average

shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as General Average for property sacrificed; deduction being made from the ship-owners' freight, and passage money at risk, of two-fifths of such freight, in lieu of crew's wages, port-charges, and all other deductions; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the arising of the claim to General Average."

"Section XI. In every case in which a sacrifice of cargo is made good as General Average, the loss of freight, if any, which is caused by such loss of cargo, shall likewise be so made good."

CHAPTER III.

PARTIAL LOSS.

General Principles.

In the UNITED STATES, "Partial Loss" is, in practice, used as synonymous with "Particular Average," and instead of that phrase. It denotes, in general, every kind of expense or damage, short of a total loss, which regards a particular concern, and which is to be borne by the proprietor of that concern alone. As between the assured and the underwriter, it means losses of this description, as far as the underwriter is liable. Thus the loss of a sail split or blown away, may, in general, and without reference to the cause of the loss, be called a Partial Loss; but, with respect to the underwriter, it is a Partial Loss only, if the loss occurred under such circumstances as to make the underwriter liable for it.

When the vessel arrives at her port of destination, or reaches a port of distress, a survey is held on her to ascertain and specify the damages she can be observed to have sustained, and the vessel is properly repaired and refitted. These repairs, if caused by a peril insured

against, after the deduction of a third new for old, form a claim under the policy against the underwriter, in the proportion the sum insured bears to the actual value, *i. e.* if the ship be not fully insured, the underwriter can be called upon to pay only on a value within, or co-extensive with the value insured; for it would be absurd to suppose that a ship-owner who only partially insures his ship, should have all the benefit which he might have secured if he had paid for an insurance on the full amount of his interest. A very important question, therefore, occurs as to the mode of estimating the amount of the insurable interest; since, the greater the value is, at which the amount of the interest is fixed, the smaller will be the sum which the insurer is liable to pay on a given amount insured, if it be less than the whole value. If \$1,000 be insured in an open policy on a ship worth \$2,000 at the commencement of the risk, which sustains a Partial Loss of \$500 at a subsequent period, when her value is diminished by wear and tear and decay, and the consumption of provisions, to \$1,500, shall the underwriter pay 50 per cent. or 66 2-3 per cent. of the loss? According to the practice, he pays 50 per cent.; that is, the value of the ship at the commencement of the risk, is the basis on which the Partial Loss is estimated. The result is the same in a valued policy in which the ship or other subject is put at an undervaluation. Accordingly, an undervaluation, or an insurance at an amount less than the value of the ship at the commencement of the risk, operates unfavorably to the underwriters in respect to Partial Loss repairs.

The species of risks usually insured against in marine

policies are perils of the seas, fire, piracy and theft, barratry, capture, arrests and detentions.

Perils of the seas.

Comprehends those of the wind, waves, lightning, rocks, shoals, collision, and in general, all causes of loss and damage to the property insured, arising from the elements and inevitable accidents.

The damage that seas can do to a ship is by striking her upperworks, by which bulwarks and staunchions, boats, spars, harness and water casks, ropes and other stores and materials may be carried away or broken; the chain-plate bolts may be broken and the rigging consequently loosened; the sea may carry away or damage the rudder, the capstan and windlass; it may break or spring masts and yards, and burst sails; it may cause the vessel to roll so as to carry away her top-masts and spars; it may burst hatches, break sky-lights, and get below into the cabin, destroying thereby perishable stores, charts, books, instruments and furniture; it may throw the vessel on her beam-ends, and threaten her with destruction; it may strain the upperworks and the decks so that water enters the ship's hold and require her to be freed from it by the use of the pumps; and it may shake the vessel throughout so violently as to wrinkle the metal sheathing and strain her, causing derangement of the caulking, the springing of butts and the opening of seams, so as to make the vessel leak below; and it may by falling on the decks break some of

the beams and other substantial parts of the fabric.

Underwriters liability for damage to ship.

Underwriters are liable for all damages, caused by a peril insured against, which happen to a sea worthy ship, even though this damage be greater than would have resulted, had the vessel been stronger. But they are not liable for ordinary *wear and tear*. And, if cables, sails, rigging, anchors, boats or the like, give out and are lost, under ordinary circumstances, without peculiar strain or any known extraordinary risk, the loss will be attributed to *wear and tear*, and not to a loss by a peril of the sea. In some instances, the nature of the loss determines the question of the underwriter's liability. If a rope give way, generally it would be because it was not strong enough. If timbers be broken, the injury would generally imply extraordinary violence. If the damage or loss fall on the spars, the sheathing or upper-works, or boats, there must always be an inquiry into the circumstances of the case, into the degree of violence which caused the loss, and the manner in which the lost article was secured against injury. Thus, if a boat be lashed on deck, only extreme violence would tear it away. If hung from the davits, at the stern or side, it is easily lost by no uncommon peril, and it may be a question whether it were so secured at that very time, as to be sea worthy, that is, able to encounter the perils it must be expected to meet. So the indefinite deterioration of the ship by straining, the opening of

seams, or butt-ends, without a storm or violence, and the like, are not covered by the policy.

In the adjustment of Partial loss on ship, it is to be borne in mind, that the underwriters are liable to pay for only what has been rendered necessary by accident. It often happens with ships which are not new, that in repairing the fresh damages, a number of old sores and imperfections come to light, and are very properly remedied as the work proceeds. When these repairs have no connection with the disaster, they should be charged to the owners, and not carried into the Partial Loss column. But, the idea, entertained by some underwriters, that *all natural decay* must be restored by the owners, is erroneous. Though timbers may be found defective, yet if broken by sea-perils, they must be replaced as part of the loss, the reason of the rule for deducting *one-third for new*, is, that in repairs, much natural decay may be necessarily remedied. Unless, therefore, the old defect were such as to render the vessel unseaworthy, no deduction is to be made on that account, for the cost of repairs. 2nd *Parsons*, 434; *Fisk v. Commercial Ins. Co.*, 18 La., 77; *Depeyster v. Col. Ins. Co.*, 2 Caines, 85; *Depeau v. Ocean Ins. Co.*, 5 Cow, 63.

The destruction of a ship by worms is not a "peril of the sea," because it is not an *extraordinary* circumstance. In certain waters, and at certain seasons, it is a natural result of causes, always in operation, which are to be expected; and it may be likened to a loss by wear and tear. It is, however, suggested by Mr. *Phillips*, and approved by Chancellor *Kent*, that the underwrit-

ers ought to be liable for the destruction of the ship's bottom by worms, after the metal has been stripped off by violent action of the perils insured against. In *New York*, the underwriters generally allow a loss under such circumstances.

In *Hazard's Administrators v. Marine Ins. Co.*, (11 Curtis, 215) the Supreme Court of the United States decided, that if a vessel take the ground, and be injured, and so exposed to worms, by which she is destroyed, her destruction is attributable, not to her injury by stranding, but to worms, provided the master had opportunity to repair the injury from stranding.

It was also decided by the same court, that if worms ordinarily assail and injure vessels, in the voyage insured, a loss by them is not within the policy.

Damage caused by the vessel's grounding or stranding is a loss by the peril of the seas within the policy, provided it do not happen in the usual course of navigation, as where a vessel is destined to a tide harbor, where she expects to take the ground when the tide ebbs.

A vessel being, in the ordinary course of her voyage, moored in harbor, floated when the tide was in, and took the ground when the tide was low, and became hogged, or strained all over in consequence. Held, that this did not constitute a loss for which an underwriter was liable, as a loss from "perils of the sea," there having been no accident. 1 *Marsh*, 218, 220; *Millar*, 183; 1 *Caines*, 234; 3 *Wash*, 159; 8 *Peters*, 557; 3 *Camp*, 133; 1 *Phillips*, 618, 628; 2 *Arnould*, 805.

To constitute a stranding, within the policy, the vessel must be on the strand, under extraordinary circum-

stances. *Potter v. Suffolk Ins. Co.* 2 Sumner, 197.

It has been decided in ENGLAND, that a ship damaged by taking the harbor ground in the regular course of the voyage, is a loss by the perils of the sea. In *Fletcher v. Inglis*, 2 B & Ald., 315, a transport in the government service, insured by a time policy for twelve months, was, within the limits of the time, and in the course of such service, taken into Boulogne harbor, where, on the ebbing of the tide, the harbor bottom being hard and uneven, she received damage by taking the ground, this was held to be a loss by the perils of the sea.

It is sometimes necessary to heave a ship down, and if she be injured while this is being done, there seems to be no good reason why it should not be considered as having happened by a peril of the sea, but it has been decided otherwise. *Thompson v. Whitmore*, 3 Taunt, 227. The underwriters, however, held themselves liable for this damage, as covered by the general clause.

In *Phillips v. Barber*, 5 B. & Ald., 161, a ship was damaged owing to her being blown over by a violent gust of wind, in a graving-dock, into which she had been put for repairs, after having discharged her outward cargo at her port of delivery, and in which there were from two to three feet of water only, when the loss happened; this was held not to be a loss by the perils of the seas, as alleged in the declaration, though the court admitted that it would be recoverable within the general clause, "other perils and misfortunes" under a count specially describing the cause of loss. The court distinguished this case from that of *Fletcher v. Inglis* (cited above), on the ground that *there* the ship was, and here she

was not, in the *ordinary course* of the voyage when the loss took place. See also, *Ellery v. New Eng. Ins. Co.* 8 Pick., 14.

The liability of the underwriters extends to any extraordinary expenses necessarily incurred in consequence of a peril insured against, as in raising funds for repairs; but not to the expense of wages and provisions of the crew while employed on the repairs; nor while the vessel is detained, as by an embargo. *Parsons' Maritime law*, vol. 2, s. 435; *Orrok v. Commonwealth Ins. Co.* 21 Pick., 456, 469.

Rule for deducting one-third new for old

The general custom in the UNITED STATES is, to deduct one-third from the cost of labor and materials employed in repairing the ship, including chain cables, whether the ship be new or old, but no deduction is made from the cost of anchors. In practice, this deduction is generally made from the incidental expenses incurred in making the repairs, such as towing the vessel to the dock where she is to be repaired, dock-dues, hire of staging &c.; but in *Potter v The Ocean Ins. Co.*, 3 Sumner, 45, Justice *Story* decided that the deduction was to be made from the *labor and materials only* employed in the repairs, and from the new articles purchased in lieu of those which were lost or destroyed, and not from incidental expenses incurred in making the repairs, which do not in any way enhance the value of the ship; as, the expenses of towing the vessel to and from the dock

where the repairs were made. The policies of insurance on ships, in ordinary use in Boston, require a deduction of one-third from the *labor* and *materials*; in New York, Philadelphia and probably most other ports in the United States, they provide, that in case of a claim for loss or damage a deduction of one-third from the *cost of repairing* the ship shall be made. The terms *cost of repairing* seem to be comprehensive enough to include the incidental expenses of towing the vessel to the place of repairs, the dockage, use of stages, cartage &c. Whether the value of the old materials should be deducted from the cost of repair, before the one-third is deducted is not settled by authority; but the rule in New York and Massachusetts is, that the value of the old materials is first to be deducted from the gross amount of expenses, and then one-third new for old is to be deducted from the balance. Under Philadelphia policies, the one-third is first deducted, and from the remainder is taken the value of old materials. Copper or yellow sheathing is treated by its own peculiar rule.

In ENGLAND, the rule is to deduct one-third from the cost of new articles, with the exception of copper or yellow sheathing, which is treated, as in the United States, in a way peculiar to itself, and except, also, from the cost of anchors, from which nothing is deducted, and except, also, chain cables, from which one-sixth is deducted. One-third is also deducted from the cost of the *labor* employed in repairing the ship; but not from graving-dock dues, use of caulking-stages, cartage and labor and boat hire in taking a vessel into and out of dock. If the vessel were a new vessel, *i. e.*, on her first voyage,

when the injury occurred, no deduction is made. *Hopkins*, 106 ; *Bailey*, 91-98.

GERMANY.—By the new German Code, §711-12, if, at the time of the casualty, the vessel have not been afloat a year, the whole amount of repairs are to be allowed ; and if the separate parts of the ship or its appurtenances to be made good have not been in use a year, the whole amount is to be allowed. In other cases, a deduction of one-third is made from the whole amount of the cost of repairs, except from chain cables, from which one-sixth is to be deducted, and nothing from anchors.

FRANCE.—According to *M. Frignet*, §637, and *M. Cauvet*, §387, one-third is, by the law or custom of France, to be deducted from the value of such new articles or materials only as are liable to be impaired by use or age, and not from anchors, chains, masts, spars and whatever is in metal ; and nothing is to be deducted from the *labor* in making repairs, nor from the repairs of a new ship just off the stocks. The *Paris*, *Havre* and *Marseilles* policies of insurance in ordinary use stipulate, however, for a deduction, in all cases, of one-third from the *cost of repairs*, and of all new articles except anchors, from which no deduction is to be made, and chain cables, from which fifteen per cent. is to be made, and also for one-third of the cost of the *labor* in making repairs.

What deduction is made on copper sheathing?

The following deduction is provided for by a special

clause in the *New York* policies : “ *A deduction of one-fortieth from the expense of repairing or replacing the metal sheathing, or any part thereof (after first deducting the value of the old metal and nails), shall be made for every month since the vessel was last sheathed, until the expiration of forty months, after which time the cost of re-metaling or repairing the same, shall be wholly borne by the assured.*” And the following has, for many years been the condition of the *Boston* offices ; “ *It is especially agreed, that instead of deducting one-third for new on the article of copper sheathing in partial loss, there shall be deducted two and a half per cent. of the cost of re-coppering, after deducting the value of the old copper and nails for each and every month the copper shall have been on the vessel at the time of re-coppering ; and if the copper shall have been on forty months, the cost of re-coppering shall be wholly borne by the assured.*” But in March, 1867, the above condition was rejected, and the following condition was adopted by the *Boston* offices, and incorporated in their policies ; ‘ *It is especially agreed, that instead of deducting one-third, on the expense of re-metaling, including docking and caulking, there shall be deducted two and a half per cent. of the cost of re-metaling, dockage and caulking after deducting the value of the old copper and nails, for each and every month the metal shall have been on the vessel, at the time of re-metaling; and if it have been on three years, the cost shall be wholly borne by the assured. In case the vessel shall be on a single bottom, the same rule shall apply to docking and caulking.*”

It will be observed that the copper clause recently

adopted in *Boston* differs essentially from the *New York*, with reference to *dockage* and *caulking*.

In ENGLAND, by the "Custom of Lloyd's," underwriters do not pay for stripping and re-sheathing of the bottom, unless the vessel have touched the ground or been in contact with some body below the water's edge.

The rule is general in the UNITED STATES, that a weight of metal equal to the quantity stripped off, is allowed in full. A deficiency in weight is charged to the underwriters; an excess of weight is charged to the owners. Where copper is stripped off, and replaced with yellow metal, the owners are entitled to claim from the underwriters, an additional amount equal to the difference between the cost of copper and yellow metal.

Mode of sheathing vessels.

The copper or metal used in sheathing vessels is divided into three thicknesses, consisting of twenty, twenty-four, and twenty-eight ounce; but oftener it is equally divided into four thicknesses of twenty-two, twenty-four, twenty-six, and twenty-eight ounce. The twenty-eight ounce should cover the bows diagonally from the fore-mast, at load line, to the heel of the fore-foot; the twenty-six ounce should run parallel from the heel of the fore-mast to the main-mast; the twenty-four ounce should run from the heel of the main-mast to the load line at the mizzen-mast; and the twenty-two ounce should cover all abaft the mizzen-mast, except

the rudder, which should be sheathed with twenty-six ounce, the beardings with twenty-eight ounce, and the keel with twenty-six ounce.

To ascertain the quantity of copper required to sheathe a vessel, measure the length of the keel, and find how many sheaths it will take to extend the whole length, allowing 3 feet 11 inches for the length of a sheet of copper; then ascertain the number of courses from the bottom of the keel to the copper line, allowing one foot one inch for one course of copper; then multiply the number of courses by the number of sheets on the keel, and the product gives the number of sheets required for each side.

A full built ship requires about 1-20th more copper than a clipper.

Sheets of copper are usually punched for three and five rows of nails.

The sheets punched with three rows require 39 nails.

The sheets punched with five rows require 49 nails.

Loss by Barratry.

Barratry is one of the perils insured against in our common printed forms of policy; it is the fraudulent conduct on the part of the master, in his character of master, or of the mariners, to the injury of the owner, and without his consent, and it includes every breach of trust committed with dishonest views. When we consider how great are the opportunities, for wrongful dealing, to the masters and crews of merchant ships,

distant from observation and every sort of restraint, and isolated in the solitary paths of the ocean, it is a loss remarkably uncommon. The scope of the word has become very wide, and it now embraces every voluntary act of the persons in possession of a ship at sea, in producing any loss or misfortune.

All loss and damage under this head are claimable from the underwriters; and though they have no voice in the appointment of a master, yet they are responsible for his acts and his conduct. There is nothing which will exonerate the underwriters from these consequences, except the absolute incompetency of the master, his officers and crew, which, if it can be proved, shows that the ship was unseaworthy from the commencement of her voyage, and therefore that the policy was void from the first.

It is necessary that the master should have no understanding or collusion with his owners in his barratrous acts. If an owner's concurrence can be shown, the act ceases to be barratrous. It may be a conspiracy between the master and the owner; but underwriters are released from any loss which comes under the head of barratry mentioned in the policy, if there be knowledge and complicity on the part of the owners. And therefore, if the master be owner, himself, there can be no barratry. *Mercardier v. Chesapeake Ins. Co.*, 8 Cranch., 39.

The most glaring cases of barratry, are those when the destruction of the ship is compassed by the master and crew; as by boring holes in her, and so causing the vessel to founder; the setting her on fire; or their

carrying her away and selling or otherwise getting rid of her, so as to possess themselves of the proceeds of the ship and cargo.

The assured cannot recover for a loss by barratry, unless the barratry produced the loss. *Swan v. The Union Ins. Co., of Maryland*, 4 Curtis S. C. R., 188.

In the case of a valued policy upon a ship, by which the underwriter is not to be liable for a Particular Average unless it shall amount to five per cent., is the per centage to be reckoned upon the valuation after deducting the premium?

In *Brooks v. Oriental Ins. Co.*, 7 Pickering's Rep., 258, it was contended by counsel that the five per cent. is to be calculated upon the valuation in the policy, and not upon the balance after deducting the premium. That the premium is to be considered as so much money expended upon the vessel. That the parties have fixed on the sum stated in the policy, as the value of the vessel for all the purposes of the policy. And cited, *Center v. Amer. Ins. Co.*, 7 Cowen, 564; 1 *Phillips on Ins.*, 314, 321, 402; *Benecke*, 119, 157; *Stevens on Av.*, 168. But, that possibly, in making up a General Average the premium may be deducted. *Phillips*, 358.

Putnam, J., however, said: "*we believe the custom is not uniform, but that the prevailing usage is, to deduct the premium from the valuation, and to calculate the per centage upon the balance*; (2 *Phillips*, 213, 346). *And we adopt that rule.* It applies only to the adjustment of Particular, and not to General Average losses;

for in the latter, the ship, cargo and freight are to contribute respectively, according to the actual value of each, and the owner of one of these subjects of Contribution, is not bound by the agreement which the owner of another of them may have made with the insurer."

General responsibility of insurers.

The insured is never to be indemnified against his own act; nor against loss directly caused by his own personal misconduct.

When the principle is applied to the misconduct of the agents of the insured, the rule in general is, that the principal is liable for the defaults of his agents, when acting as such, and he is not insured against loss thence arising, unless it be clear that the insurer intended to take upon himself these risks.

As a general rule, the insurers are not liable for a loss against which they insured the owner, if it be caused, directly, by the mistake, ignorance or neglect, of the master or crew.

The question, how far the underwriters are liable for a loss caused by a peril insured against when the vessel is in an unseaworthy condition, owing to the negligence of the master and crew, does not seem to be entirely settled by the authorities. It is very clear that the underwriters do not insure against the negligence of the master or crew, nor losses arising directly from such negligence. It is, however, settled in both

England and the United States, that if the loss be caused by a peril insured against, the underwriters are liable, although the remote cause be the negligence of the master and crew, and this whether barratry be insured against or not. *Walker v. Maitland*, 5 B. & Ald., 171; *Shore v. Bentall*, 7 B. & C., 798; *Bishop v. Pentland*, 7 B & C., 219; *Dixon v. Sadler*, 5 M & W., 405, 415; *Patapsco Ins. Co., v. Coulter*, 3 Peters, 222; *Williams v. Suffolk Ins. Co.*, 3 Sumner, 270, 276; *Draper v. Comm. Ins. Co.*, 4 Duer, 234, 239; *Nelson v. Suffolk Ins. Co.*, 8 Cush., 477, 496; *Perrin v. Protection Ins. Co.*, 7 Ohio, 147.

In *Matthews v. The Howard Ins. Co.*, 11 New York Reps., 9, it was held: "Where the immediate cause of loss to a vessel is a peril expressly insured against, it is not a defence that the negligence of the master and crew occasioned such peril or brought her within it."

In *Am. Ins. Co., v. Ogden*, 20 Wend., 287, it was held, that where a total loss could be attributed to the owner's neglect in not furnishing funds, the underwriters are discharged.

Underwriters are not bound to supply funds in a foreign port for repairs. They are simply bound to pay the Partial Loss. *Bradlie v. The Maryland Ins. Co.*, 12 Peters, 378.

The insured always warrants, by construction of law, that his ship is able to encounter safely all ordinary risks, for this is precisely what is meant by sea worthiness; and it amounts to an agreement to warrant the insurers against all ordinary risks. In *Barnewall v. Church*, 1 Caines, 217, 234, Mr. Justice Thompson

said: "The insurer undertakes only to indemnify against the extraordinary and unforeseen perils of the sea, not against the ordinary perils to which every ship must be exposed in the usual course of the voyage proposed." In *Coles v. The Marine Ins. Co.*, 3 Wash. C. C., 159, Mr. Justice *Washington* said: "If the loss of the vessel arose from the ordinary circumstances of a voyage, or from sea damage, or wear and tear, which, without the action of any extraordinary causes, was to be expected, the insurer is not liable. But if it happened in consequence of the violence of the winds and waves, running on rocks or the like, these are perils against which the insurer agrees to indemnify. It is not sufficient for the insured to prove that there were storms during the voyage, unless he can fairly trace the injury sustained, to that cause."

What are ordinary, and what extraordinary perils, is a question of much difficulty. In *Magnus v. Buttemer*, 11 C. B., 876, 9 Eng. L. & Eq., 461, a vessel in the ordinary course of her voyage, moored in a tide harbor, and took ground when the tide fell. In consequence of this she was hogged and strained all over. It was held that the underwriters were not liable. In *Potter v. Suffolk Ins. Co.*, 2 Sumner, 197, under very similar circumstances, Mr. Justice *Story* held, that unless there were inherent weakness in the vessel, such damage could only be occasioned by an unusual and extraordinary accident in grounding upon the ebbing of the tide, which would be a peril of the sea. And in *Bullard v. Roger Williams Ins. Co.*, 1 Curtis' C. C., 148, Mr. Justice *Curtis* held, that although the law required

vessels to be sufficiently strong to resist the ordinary action of the sea in the voyages for which they might be insured, yet that the ordinary action of the wind and sea did not mean the winds and sea to be ordinarily met in the voyage insured. He accordingly held that heavy cross seas were not the ordinary action of the sea within the meaning of this rule, however common they might be in the voyage insured.

The peril of capture is not subject to degrees, but is always considered to be extraordinary, and in all cases gives the assured the right of abandoning and claiming for a total loss. But other perils of the seas may be ordinary or extraordinary, and so may their effects; and unless the degrees of a peril and its effects are both extraordinary, the assured has no claim for indemnity. But the effect may itself show that the cause must have been extraordinary.

Though the operation of a peril insured against is extraordinary, if its consequences be not so, it is not a loss within the policy. Stranding is usually an extraordinary incident, yet if its consequences be not extraordinary, the assured has no claim against the underwriters. In a case of a ship's being strained, and accordingly weakened, and injured, in consequence of stranding. Mr. Justice *Baldwin* said: "Invisible, uncertain and conjectural damages are never the subject of remuneration. I apprehend the injury is not the subject of adjustment, unless it be capable of repair in the ordinary course of business. *Sage v. Middletown Ins. Co.* 1 Conn. R. 239. And so it was held by the Supreme Court of Massachusetts, the underwriters are not

answerable for indefinite straining and deterioration, which cannot be repaired and of which no specific estimate or evidence can be given. *Orrok v. Commonwealth Ins. Co.* 21 Pick., 456; *Crofts v. Marshall*, 7 C. & P., 597; *Peele v. Suffolk Ins Co.*, 7 Pick, 254.

In the case of *Giles v. Eagle Ins. Co.*, 2 Metcalf's Reps. 140. The schooner "Good Hope," sailed from Gloucester, in good order and condition, within the time specified in the policy, for the Bay of Chaleur, on a fishing voyage. In a heavy gale, she dragged her anchors and went ashore; cargo was discharged; vessel got off, and subsequently repaired. After repairs she was seaworthy; a surveyor was called to estimate the damages done to her by going ashore, and which had not been repaired. The survey stated (and it was proved in court by experts) that the whole body of the schooner was injured; that some of the timbers were lifted; some of her treenails started; and that the injury from the strain or hogging could not be perfectly repaired, except by rebuilding her. That the hogging remained after the repairs, and that it affects not only the beauty but also the strength of the vessel. And the damage from the hogging and strain was estimated from \$800 to \$1000. It was contended by the counsel for the underwriters that this is an imaginary damage, for which the underwriters are not responsible; and that no such charge has heretofore been allowed in the law of insurance. *Putnam, J.* held: "The case is not without its difficulties. The assured cannot be permitted to claim for unseen and imaginary damage; for there can be no standard to measure the correctness of the estimate; and

the result would frequently be an allowance against the insurers commensurate with the wants to make up a total loss, wherewith to charge the underwriters. But in the case before us, in consequence of the damage within the perils of the policy, some of the timbers have been lifted, and a vessel that is found to have been one of the first class, is left, after her repairs, so misshapen as essentially to affect her value. There is no mistake about the main fact. She is obviously so much hogged as not to be perfectly repaired, unless by rebuilding her. She has been made seaworthy, but it is in evidence that she is not so strong as she would be were she as straight as she was built. Now the assured is entitled to an indemnity. If an insurance should be obtained upon the schooner as she now is, and a damage should happen to her, all that could be required of the underwriter would be to put her in as good state and condition as she was when the policy was made. It could not, on any principle of indemnity, be required that she should be put in better shape and condition. Here, at the time of the insurance, this schooner was of the first class. By the perils of the sea she has received an injury obvious to the eye, and essentially affecting and diminishing her value. How can it be said that the plaintiffs are indemnified, if compensation should not be made for this damage? We do not intend to shake the doctrine which we have recognised touching imaginary or theoretical strains. It may be, theoretically speaking, that whenever a ship takes the ground, all her timbers, from the keel to the water-ways, must of necessity be in some degree disjointed. But this is not such a case. Here the

damage is actual, visible and tangible. And if this vessel should hereafter take the ground, or encounter extraordinary seas, it is not to be expected that she should stand the shock as well as if her timbers had not been lifted and disjointed. In the present instance, it is to be observed that there is no evidence of any design to make up a case, or to strain a point with a view to a certain result. But the claim is put forth and proved as a real damage from the injury sustained within the perils of the policy, and is to be allowed." An allowance of \$800 was made.

Seaworthiness.

There is in every policy an implied warranty that the ship is seaworthy when the policy attaches. This means, that the vessel is able to resist the ordinary attacks of wind and weather, and is completely equipped and manned for the voyage, with a sufficient crew, and with sufficient means to sustain them, and with a captain of general good character and nautical skill.

There is nothing in the law of marine insurance more important, both with a view to the benefit of commerce and the preservation of human life, than to enforce, as far as possible, a strict compliance with this warranty ; as, otherwise, the effect of insurance might be to render those who were protected from loss by the policy exceedingly careless about the condition of the ship and the consequent safety of the crew.

The courts, accordingly, have held that the seawor-

thiness of the ship for the voyage, when she sails, is a condition precedent to the underwriter's liability for any loss incurred in the course of the voyage. *Deshon v. Merchants' Ins. Co.* 11 Metcalf, 199, 207.

Of so much importance has the seaworthiness of ships always been esteemed, both in respect of claims which may be made against underwriters for damages, or as a protection against claims made on the ship by proprietors of goods which have received damage, that the notarial document called the protest, always commences with a declaration that the ship at the time of her sailing, was "stanch, strong and sufficiently manned and furnished for the intended voyage,"—or words to the same effect. This form has come to be considered so completely a part of a protest that some notaries and consuls keep the preamble which contains these words, in print, to be used as a matter of course.

Any defect which may endanger the ship, though unknown to the assured, will discharge the underwriters. It is not necessary to inquire whether the owners acted honestly and fairly in the transaction; for it is well understood that however honest the intentions and conduct of the owner may be, if he be mistaken in the fact, and the vessel be really not seaworthy, the underwriters are not liable.

It is the duty of the assured to keep his vessel seaworthy during the voyage, if it be in his power to do so. If, therefore, she be disabled at sea, though she remain covered by the policy until she reach a port, she must leave that port, wherever it may be, in a seawor-

thy condition, provided she can there be made seaworthy.

If a vessel, in the course of her voyage, put into a port where repairs can be made, and afterwards sail therefrom with a defect in her bottom, produced during the voyage by the perils of the sea, and which causes her to founder, the insurers are liable for the loss, unless the captain have reasonable cause to suspect the existence of the defect when the vessel was in port, or had reasonable cause to believe that she could not proceed safely home without having the same repaired. 11 Pick., 227; 1 *Sumner*, 218; 8 *Peters*, 558; 3 *Mass.*, 331; 3 *Mass.*, 485.

The absence or insufficiency of *ballast*, in a vessel of a build which required it, renders her unseaworthy, and releases the underwriters from all liability. *Deblois v. Ocean Ins. Co.* 16 Pick., 303; 2 *Phillips*, §706; 1 *Arnould*, p. 681.

The owner is answerable on his contract, for *latent defects*, even though the ship had been previously visited by experienced shipwrights, and the defect had escaped detection. 3 *Kent's Com.*, p. 288, and cases there cited.

It is not sufficient to satisfy the warranty of seaworthiness, that the ship has been pronounced seaworthy by skilful shipwrights, after a careful examination. *Brig Casco, Davies, D. C. R.* 192 *per Ware, J.*; 3 *Kent's Comm.*, p. 391, note.

Seaworthiness of the ship at the beginning of the risk, is in law, presumed, until it have been shown that the vessel, without incurring more than ordinary perils has

proved unfit to make the stipulated voyage. The burden of proof is then shifted upon the assured. Seaworthiness is a question of fact for a jury. *Myers v. Girard Ins. Co.*, 26 Penn, 192; *Field v. Ins. Co.*, 3 Md., 244; 3 *Kent's Comm.*, p. 391, n.

Seaworthiness, at the commencement of the voyage, is a condition precedent, and if seaworthiness do not then exist, the policy is void, and the insurers are not responsible for subsequent loss, even if it arise from another cause; for the policy never attached. *Starbuck v. N. E. Ins. Co.* 19 Pick. R., 199; 2 *Parsons*, 139; 3 *Kent*, 392, n.

Where a ship is insured for a voyage it is the duty of the owner to keep her seaworthy during the voyage, if it be in his power, and if she be rendered otherwise, by neglect of the master or owner, the underwriters are discharged. 11 Pick. R., 232.

The implied warranty of seaworthiness is, that she shall be able to perform her voyage with the *cargo with which she is then loaded*. *Abbott v. Browne*, 1 Caines, S. C. of N. Y. Reps., 292.

It is a condition precedent, in all contracts of insurance, that the vessel shall be seaworthy at the inception of the risk, and it is well settled law, that in the event of vessels under a "*time policy*," or for successive passages, it is incumbent on the assured to see to it that the vessel is seaworthy at the time of her departure from each port she enters during the life of the policy of insurance, by which she is covered. 2 *Parsons*, *Mar. Law*, 139. *Capen v. Washington Ins. Co.*, 16 Law Reporter, 4651.

In *Paddock v. Franklin Ins. Co.* 11 Pickering's R., 235. *Shaw*, C. J., held : " There can be no doubt, that after a vessel has met with such accidents, disasters and losses, as to weaken and disable her, or by age and decay, worms, wear and tear arising from long service, and the ordinary pressure and action of the winds and sea, she has become incapable of proceeding with reasonable safety, it is the duty of the owner to procure the necessary repairs and supplies as soon, and as effectually, as he reasonably can do so, under the circumstances in which the ship is placed. If in a remote sea, or at a desolate or savage island, a temporary expedient, however inadequate to the wants of the ship, must be sufficient, being the best which can be resorted to. But if a vessel in such a condition reach a port where repairs and supplies can be obtained, and leave such a port without obtaining them, it is a fault and negligence on the part of the owner. If the ship be afterwards lost by a cause which may be attributable to the insufficiency of the ship, and which cannot be clearly traced to some independent and wholly distinct cause, as capture or fire, the underwriters are discharged, as well on the ground that the loss arose from the fault and negligence of the ship-owner, as from ordinary perils or internal decay and defects of the ship, which are perils not insured against."

There is no presumption that defects in the hull, found during the voyage, were produced by perils of the sea. The burden is on the assured to prove this. *Ballard v. Roger Williams' Ins. Co.*, 1 Curtis' R., 148.

Seaworthiness being a condition precedent to the at-

taching of the policy, some proof of its fulfilment must in all cases be first given by the assured. *Moses v. Sun Mutual Ins. Co.* 1 Davies' R., 159. 3 *Kent's Comm.* 392, n.

In *Copeland & others v. New Eng. Mar. Ins. Co.*, 2 Metcalf's Sup. Court of Mass. Reports, 439, *Shaw*, C. J., held: "We consider it a rule of the law of insurance, as settled here (Massachusetts), that in addition to the implied warranty which applies to the state of the vessel at the commencement of the voyage, and must be strictly complied with as a condition precedent, it is the duty of the assured from time to time, during the voyage, to repair and keep her in a suitable condition for the service in which she is engaged, and if they fail to do so, and a loss happen which is attributable to that cause, the assured, and not the underwriters, must sustain it."

If the vessel spring a leak soon after sailing, without having met with any peril, this raises a presumption that she was unseaworthy when she sailed. But this presumption may be rebutted by proof that she was actually seaworthy when she sailed. And when a vessel is shown to have met with a sea-peril, if the insurer claim that the damage was owing to her being unseaworthy, and not to the sea-peril, the burden is on him to show this, (*Barnwell v. Church*, 1 Caines), 217; and if the vessel sail and never be heard from, the fact of her seaworthiness is presumed, in the absence of evidence to the contrary. *Deshon v. Merchants' Ins. Co.*, 11 Metcalf, 199, 207.

IN ENGLAND it seems now to be held, that negligence of the master and crew, or of persons employed to load the

vessel at an intermediate port, will not exonerate the underwriters, although she be lost in consequence of such negligence. *Redman v. Wilson*, 14, *M. & W.*, 476.

If, after the risk has commenced, she become unseaworthy by reason of an accident or peril, then the policy continues to attach, until she can again, by reasonable endeavors, be restored to a seaworthy condition. It is indeed, the duty of the master, for which the owner is responsible, not only to do all that can be done to prevent her unseaworthiness, but to do all that should be done to restore her seaworthiness. If, therefore, she be disabled at sea, though she remain covered by the policy until she reach a port, she must leave that port, wherever it may be, in a seaworthy condition, provided she can there be made seaworthy. And analogy of reasoning would require that a master, finding his ship unseaworthy at sea, should make, not necessarily at once for the nearest port, but for a port of repair, without unnecessary delay, because otherwise he would expose the vessel to unreasonable and unnecessary danger. So, too, if the unseaworthiness could, without great sacrifice, be cured at sea, by help from another vessel, it should be the master's duty to obtain this help. Whether or when the insurers are discharged by the master's non-fulfilment of such duties, is a more difficult question. On the one hand, although the misconduct or neglect of the officers and crew be not among the dangers against which the owner is insured, yet if the subject matter insured be lost by a peril caused by such negligence, the underwriters are held liable therefor. On the other hand, the master is the representative and agent of the

owner, with power and authority, and it is his duty to fulfil for him this warranty of seaworthiness, and a breach of it by such an agent is a breach by the principal. Perhaps no better answer, or none which more nearly reconciles the conflicting authorities, can be given, than that the decision of the question must depend upon whether the person in command of the ship, then acts only in discharge of his personal duties as master or mate, or acts, or ought to act as the representative and agent of the master. And, generally, the conclusion would be, that if the ship be seaworthy in the beginning, a subsequent unseaworthiness, caused by negligence or error of officers or crew, does not take away the responsibility of the insurers. Leaving it still as a rule of law, that it is a duty of the master to repair unseaworthiness in the first port, the disregard of which is a breach of the warranty by the owner. 2 *Parsons' Mar. Law*, 140; *Paddock v. Franklin Ins. Co.*, 11 Pick., 227; *Hazard v. New England Ins. Co.*, 1 Sumner, 218, 230; 8 Peters, 557; *Deblois v. Ocean Ins. Co.* 16 Pick, 303, 308; *Starbuck v. New England Marine Ins. Co.* 19 Pick, 198; *Copeland v. N. England Mar. Ins. Co.* 2 Metcalf, 432, 443.

It must, however, still be remarked, that this breach does not always and necessarily discharge the underwriters, but only suspends their liability. Thus, if a ship lose her anchor in a port where she can get no other, or lose her boat at sea, or lose some of her crew; and reach a port where these wants could be supplied, but leave it without supplying them, and proceed to another port and there supply them, and so become

again seaworthy, the liability of the insurer revives. It was so far suspended during the interruption of the seaworthiness, that if a loss had happened in that interval, that is, after the master could have supplied her wants, and before he did supply them, and this loss happened by reason of the insufficiency or unseaworthiness of the ship, the underwriters would not have been liable. 2d *Parsons*, 142.

In *Paddock v. Franklin Ins. Co.*, 11 Pick., 227, 234, *Shaw*, C. J. said: "It would seem to be more consistent with the nature of the contract, the intent of the parties, and the purposes of justice and policy, to hold, that after the policy has once attached, the implied warranty should be so construed as to exempt the underwriter from all loss or damage, which did or might proceed from any cause thus warranted against; but to hold him still responsible for those losses which by no possibility could be occasioned by peril increased or affected by the breach of such implied warranty." See also, *Taylor v. Lowell* 3 Mass., 331; *Merchants' Ins. Co. v. Clapp*, 11 Pick., 56; *Capen v. Wash. Ins. Co.*, Sup. Jud. Ct., Mass., 16 Law Reporter, 465; *Starbuck v. N. E. M. Ins. Co.*, 19 Pick. 198; *Chase v. Eagle Ins. Co.*, 5 Pick., 51; *Am. Ins. Co. v. Ogden*, 15 Wend., 532; 20 Wend., 287; *Peters v. Phœnix Ins. Co.*, 3 S. & R. 25; *Hazard v. N. E. Mar. Ins. Co.*, 1 Sumner, 218, 230.

The ship is unseaworthy if she be *without a pilot*, where usage and the reason of the case require that she should have one, whether in entering or leaving a port.

Deviation.

Insurance is a contract whereby, for a stipulated premium, the underwriters agree to indemnify the assured against certain perils or risks; and that the contract may be fair between the parties, the premium must be adequate, or in due proportion to the risks. But this would be impossible unless the risks can be, to a certain extent, known beforehand, and therefore estimated.

The underwriter undertakes to indemnify the assured upon the implied condition, only that the risk shall remain precisely the same as it appears to be on the face of the policy. If the insurance be upon a voyage, it must be distinctly stated; and its course and termini being known, the underwriters can judge of the risks to be encountered on that voyage. It is, therefore, always presumed that the voyage is to be pursued in the most direct and safe course, and the adventure conducted, in general, in the most expeditious manner as far as is consistent with safety; and if there be any departure from such course or mode of conducting the adventure, the assured must justify such departure, by showing either a usage in that respect, or a reasonable necessity.

In practice, a slight change, which does not increase the risk, is not considered a deviation. The rule is this, if the customary course of ships on that particular voyage, have been so long established and so well known, that the underwriters are justified in calculating upon that course, as the one the ship will, if possible, pursue, the master must not deviate from it, unless compelled to do so from necessity. If there be no such usual

course, then the master is bound to proceed to the destined terminus in the most natural, direct, safe and advantageous way.

It is perfectly well settled, that any deviation whatever discharges the insurers from all further responsibility; leaving them, however, liable for any loss occurring before the deviation, and caused by a peril insured against. *Richardson v. Maine F. & M. Ins. Co.*, 6 Mass., 102. Nor are they discharged if the change of risk be merely temporary, and when it ceases, all subsequent risks be precisely and certainly the same as they would have been had no deviation taken place. In this case the effect of the deviation is to only suspend the responsibility of the insurers, and discharge them from any liability for a loss, which occurs during the existence of the deviation. But it is obvious, that there are very few changes of risks, that can be said to leave all the subsequent perils in precisely the same condition as if there had been no change; and this exception, therefore, is seldom applicable. 2 *Parsons*, 278. Mr. Justice *Sedgwick*, in delivering the opinion of the court, in *Coffin v. Newburyport Mar. Ins. Co.*; 9 Mass., 436, 449, said: "It is undoubtedly true that the shortness of the time, or the distance of a deviation, makes no difference as to its effect on the contract. Whether for one hour or one month, or for one mile or one hundred miles, the consequence is the same. If it be voluntary and without necessity, it puts an end to the contract." But it is obvious that in some cases there may be a temporary deviation, which would exonerate the underwriters for loss during such deviation, but not for a subsequent loss.

Thus, if a steamboat which makes regular trips between two ports, be insured for one year, and if, after the trip for the day is ended, she should tow a vessel or do any other similar act, the underwriters would clearly be liable, if she were subsequently lost on a regular trip or while lying in port, but not if she were lost while engaged in towing.

The most frequent emergency for going off the usual course of the voyage is to seek a port of necessity, to repair damages, and to refit. When, in consequence of disaster, the vessel cannot safely pursue the voyage, the master is not only justified in quitting the course and seeking the most convenient and suitable port for repairs and supplies, but it is his duty to seek such port. And if a vessel do not find repairs and supplies at the first port of necessity she may proceed to a second. *Hall v. Franklin Ins. Co.*, 9 Pick. 466.

The ship may go out of its course, or delay, to avoid disaster, no less than to refit after one has happened—as to avoid capture. *Oliver v. Maryland Ins. Co.* 3 Johns, 487: *Reade v. Commercial Ins. Co.*, 3 Johns, 352. Or to join convoy, though not warranted or represented to sail with convoy. *Patrick v. Ludlow*, 3 Johns' cases, 10. Or to avoid ice. *Graham v. Commercial Ins. Co.* 11 Johns, 352. Or to gain intelligence at an intermediate port, in case of the master having been informed on the voyage that trade at his port of destination had been put under the same restrictions as if it were blockaded. *Lee v. Gray*, 7 Mass. R. 349. Or leaving a port with the vessel in an unseaworthy condition to avoid being sur-

prised and seized there. *Wiggin v. Amory*, 13 Mass. R., 118.

Going into a port which did not belong to the established, or the natural and proper voyage, is certainly a deviation; and, in fact, a very common one.

If a master, however honestly, mistake the course, when one is marked out by usage, it is a deviation. For where a course is so prescribed and defined the assurers have a right to require, that the master shall know it, and shall follow it. *Phyn v. Royal Exch. Ass. Co.* 7 T. R. 505; *Brazier v. Clapp*, 5 Mass. 1.

Delay or going out of the course to succor those who are in distress, has been invariably held not to be a deviation. In regard to delay, by the schooner *Magnolia*, to save the crew of the *Boston*, that had been run down, Mr. Justice *Story* said: "Beyond all question, at least in my opinion, it was the duty of the master of the *Magnolia* to interrupt his voyage, for the purpose of taking on board the crew of the *Boston* in their suffering state, for the safety of their lives. It was a duty thrown on him by the first principles of the natural law, the duty to succor the distressed; and it is enforced by the more positive and imperative command of Christianity. The stoppage for this purpose, could not, in my judgment, be deemed, by any tribunal in Christendom, a deviation from the voyage, so as to discharge any insurance, or to render the master criminally or civilly liable for any subsequent disasters to his vessel occasioned thereby." *The schooner Boston*, 1 Sumner, 328.

But where the sole object is to save property, and the delay is solely attributable to that purpose, or where part

of the crew of the saving ship is put on board to navigate the distressed ship, and thereby the crew of the saving ship is materially diminished, it is admitted to constitute a case of deviation. There is a distinction between a deviation to save life and a deviation to save property. *Bond v. ship Cora*, 2 Wash. C. C. R., 80; *Mason v. ship Blaireau*, 2 Cranch, 268; *The schooner Boston*, 1 Sumner, 328; *The ship Henry Ewbank*, 1 Sumner, 400; *Warder v. Goods &c.* 1 Peters Adm. R., 31.

While a vessel is detained at a port of necessity, it is no deviation to take in additional cargo, if no additional delay or risk be occasioned thereby. 3 *Kent*, 5th ed., 314; *Chase v. Eagle Ins. Co.*, 5 Pick., 51; *Hughes v. Union Ins. Co.*, 3 Wheat., 159; *Paine v. Col Ins. Co.* 2 Johns, 264; *Bork v. Norton*, 2 McLean R., 422.

Damage by Fire.

Fire is not a peril of the sea as between the shipper of goods and the ship-owner, and therefore most bills of lading contain an express exception against fire. The same rule would apply to a case of insurance; but as fire is always specifically insured against, the underwriters are liable.

When fire breaks out in a ship it generally ends in her destruction; the great bulk of a vessel being composed of combustible, and certain parts, of very inflammable materials. When only partial in its damage, the

injury from burning is Partial Loss, and subject to the same rules as the preceding.

Liability of underwriters for loss by pirates, robbers or thieves.

The usual insurance against these risks, renders the underwriters liable for losses or damage arising from all such acts as amount to piracy or robbery; even, it is said, if they be committed by the crew, provided due care and diligence have been used to prevent them. 3 *Kent's Com.* 303; 2 *Parsons' Mar. Law*, 236; 1 *Phillips' Ins.* §1106; 2 *Arnould* §817.

Liability of the underwriters under the general clause, respecting other perils.

The general clause against all other risks and perils covers other perils of a like kind to those specified.

After the enumeration of the particular risks, the policy usually contains a general clause, by which the subject is insured against "*all other perils, losses and misfortunes which shall come to the hurt, detriment or damage of the said goods or ship &c. or any part thereof.*"

The final undertaking of liability by the underwriters, may seem so wide as to include every loss, damage and contingency which can happen to the ship. And

it may seem to exclude any defence which underwriters might make to an action for loss or damage brought against them. The definition of the underwriter's liability is, certainly, very comprehensive; but we must look to the usual and consistent interpretation which has been made of the terms by courts of law and by writers on the subject of insurance; and also, which is of great importance, to that general impression which prevails in the minds of underwriters themselves when they sign a policy; because *intention* though not on every occasion openly expressed, is to be looked to in construing contracts which are for the most part couched in the unvarying terms of a printed form. It may, then, be unhesitatingly asserted that underwriters by their policy have no intention of granting such a plenary indemnity as it would amount to if they undertook to restore every ship at the end of the voyage insured to the same condition in every respect in which she was when she sailed. For then they would virtually have to repair the ordinary ravages of time. They would have to cure the inherent defects which might have existed in the ship, and which from some cause exhibited themselves during the currency of the policy. The underwriters do not mean to undertake this. The foundation of claims on them is *accident*. The damage which the vessel sustains must be something extra to the ordinary events, to the ordinary waste and decay which all shipping is subject to. The underwriters, it must be borne in mind, are responsible for the *extraordinary*, and not the ordinary, events of a voyage.

The general clause enlarges the scope and operations

of the policy very little, because by a common principle of construction (that general words are restrained by the particular recital), it is always construed to mean other perils of like nature or character with those enumerated, which would therefore be included, generally at least, in the other clauses.

But these words have been declared by courts to be material and operative, and underwriters have been held liable under them, but, as it seems, in most of these cases they might have been held liable as well under other clauses. In *Cullen v. Butler*, 5 M. & S., 461, the vessel was lost by being fired into through mistake.—Held, that the loss was covered by the general clause. The following have been held to be covered by the general clause. Damage done to a vessel in a graving-dock for repairs, by being blown over by the wind. *Phillips v. Barber*, 5 B. & Ald., 161; or by the explosion of the boiler. *Perrin v. Protection Ins. Co.*, 11 Ohio, 147; or while the vessel is being hauled up on a marine railway and is partly in the water and partly on the land. *Ellery v. New Eng. Ins. Co.*, 8 Pick. 14; injury sustained by the accidental breaking and giving way of the tackle and supports whereby the vessel was supported in being moved from a dock where she had been hauled up for repairs. *Deveaux v. J Anson*, 5 Bing. N. C. 519. In *Moses v. Sun Mutual Ins. Co.*, 1 Duer, 159, it was held that a loss occasioned by the sale of a part of a cargo of provisions to pay for necessary supplies at an intermediate port and the necessary consumption of the rest by the passengers and crew, owing to the want of a proper supply on board the ship was not covered by this

clause. Mr. Justice Duer said : “ The words of the general clause, broad as they are, in this as in many analogous cases, are limited in their application by the specification that immediately precedes them, and therefore have their due effect assigned to them, by allowing them to comprehend and cover only such other cases of marine damage as are of the like kind (*ejusdem generis*) with those specifically enumerated, and are occasioned by similar causes.

Particular Average or Partial Loss of Goods.

The ENGLISH adjusters make a distinction between Particular Average and Partial Loss ; thus, the term “ Particular Average ” is used to signify the loss arising from the article being deteriorated in value, in consequence of its being sea-damaged, and sold at the proper termination of the voyage ; and the term “ Partial Loss,” to signify a loss arising on damaged goods which are sold at some place short of their destination. They also make this further difference between the two :—that in a Particular Average it is essential that the loss should reach the limit in the warranty, but in a Partial Loss, the claim is paid although it do not amount to the five per cent., or other limit as warranted. The two species of loss are considered strictly as different in nature, and they are not allowed to influence one another.

In the UNITED STATES, no distinction is made in practice, between Particular Average and Partial Loss, but the term “ Partial Loss ” is more frequently used ; and in

this chapter we shall apply it to a depreciation on goods, arising from the deterioration of the quality of the goods, or from a reduction in quantity, or from both combined, owing to sea-perils, and ascertained at their place of destination.

Before entering upon a detailed examination of the mode of adjustment of Partial Loss on goods, it will be desirable to refer to the policy, and observe those clauses and expressions which apply especially to merchandise.

The policy states the general intention of the insurance to be "upon all kinds of lawful goods and merchandise, laden or to be laden on board the ship —"; and its period of endurance to be as follows: "beginning the adventure upon the said goods and merchandise, from and immediately following the loading thereof, on board of the said vessel at — aforesaid, and so shall continue and endure until the said goods and merchandise shall be safely landed at — aforesaid." The statement of adventures and perils, covered by the policy, is the same on goods as on ship. But the "Memorandum" contains special matter relating to goods, of very great importance; for it excludes some species of merchandise from restitution in case of damage, and fixes the limit of deterioration, which must be reached in other species, in order to constitute a claim on the underwriter.

The policy gives security to the goods from the moment they are loaded on board the ship, and the underwriter's liability continues until they are safely landed.

The goods set forth in the memorandum are more susceptible of injury than others, some contain the causes of deterioration or destruction within themselves, so that

the smallest access of sea-water to them is able to set on foot an action which may afterwards go on and damage or waste them to a great extent. With some, ordinary causes, such as humidity of the atmosphere, the heat of the ship's hold, or the dampness that is commonly found in a ship, will produce deterioration, decomposition or germination, without waiting for more definite accidents. Thus the difficulty of attributing damages of this kind to their authentic source, and the still greater difficulty of distinguishing between damage where two causes have been at work, has made it expedient, both in order to avoid disputes, and to obtain a moderate scale of premiums, that either such goods should be excluded altogether from Average claims or that a higher limitation should be put upon them. Where, however, a larger indemnity is desired than the ordinary form of policy gives, a special agreement is entered into with the underwriters, making additional terms as to the payment of loss, in consideration of paying an extra premium for the additional risk. This agreement being made in writing will override the usual printed clause.

We will now endeavor to show, as consisely as possible, the recognised mode of adjusting a Particular Average or Partial Loss on goods.

Those merchants not conversant with the adjustment of marine losses, generally think that the best and simplest plan to settle an Average loss on goods, is on the principle of a salvage loss,—that is, to deduct the proceeds from the insured value. It can readily be shown that this method of claiming for damage can rarely be correct; for by it, if goods come to a rising market, they

may sell so well, so much higher than it was expected they would, that though they may have been really heavily damaged, only a small claim, or none at all, will result; whilst, as the converse of this, goods arriving at their destination to a depressed and falling market, though really damaged ever so little, might establish a claim of 50 per cent. or upwards, on the policy. This would be involving underwriters in the fluctuation of markets, a risk they never take upon themselves; the insurance they grant being against sea-perils only.

It is now conceded that the only correct mode of adjusting a Partial Loss on goods where the ship has arrived at, or the goods have been brought to, the port of destination, is by comparing the market price of the sound merchandise with the market price of the damaged; and thus ascertaining the relative depreciation in value sustained by the merchant from the sea-damage.

The following example in figures, will elucidate the present practice :

Suppose 250 packages of goods were insured from Liverpool to New York, for \$2,568.

On arrival at New York, 104 were found damaged by sea-water, and sold at auction.

If these 104 packages had arrived *sound*, their value would have been \$1,080 00

Less discount for cash 37 80

Cash sound value \$1,042 20

But, being *damaged*, they produce *gross*, cash 838 20

The difference \$ 204 00

Is equal to $19\frac{5789}{10000}$ per cent

The *insured value* of 104 packages is \$1,047 34

Which, at $19\frac{5789}{10000}$ per cent., would lose \$205 01

Equal to $7\frac{98}{100}$ per cent.

To which add, auction charges, port-warden's fees, copy of protest &c.	26 94
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Claim on underwriters	\$ 231 95
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The loss as we have seen, is equal to $7\frac{98}{100}$ per cent.

If the goods had been insured "free of Particular Average under 8 per cent.," there would be no claim, although the auction charges, port-warden's fees, and copy of protest—the usual expenses of ascertaining the loss, added thereto, should cause the amount to exceed the required per centage. The expenses are like costs of suit, and fall upon the losing party.

Having, in the foregoing illustration, shown that the gross value of the damaged goods, and that which the same goods would have had if sound, form the basis of the adjustment of the claim for Partial Loss, it will be necessary to investigate the mode of ascertaining these respective values.

It is customary to sell *damaged goods* by public auction; and when that is done, the person who adjusts the claim, after satisfying himself that the damage originated in fact in a peril insured against, will have nothing to do in this respect, but to see that the sales are duly certified. It occurs sometimes in small places, where it is not customary to sell goods by auction, that the value of the damaged article is estimated by sworn brokers or merchants. This mode of proceeding may, in many in-

stances, be more to the advantage of the underwriters than an actual sale ; but the credit which can be given to such valuations, will, of course, depend entirely upon the respectability of the parties.

The value which damaged goods would have had in a *sound* state, is not always easily ascertained. There is no difficulty with respect to current articles at a place *where it is customary to sell them by auction*. The public sale of the undamaged part of goods of the same quality will immediately show what the damaged would have been worth. But with respect to goods which it is *customary to sell by private contract*, a public sale would not show the real value, because such sale may be supposed, in general, to be less advantageous than the other. For this reason, as also because the assured cannot be obliged to sell that part of his goods for which there is no claim, merely to ascertain the value of the damaged, the underwriters have no right to insist upon a sale of the undamaged part. Under such circumstances, the only way is, to ascertain the value of the sound goods by the estimate of sworn brokers or merchants, and it is to be observed, that neither the highest price at which such goods might have sold in small quantities, nor the lowest price at a forced sale, ought to be taken, but a medium between the two, or, if possible, the price at which the damaged can be replaced at the time by sound.

Having stated the mode by which the respective values of sound and damaged goods are ascertained, the next point to be looked at, is, whether gross or net proceeds are to be taken. Our illustration of an adjust-

ment of Partial Loss on goods, shows, the adjustment is made on a comparison between the *gross* proceeds of the sound and damaged goods. The reason why the *net* proceeds are not taken against a *net* sound value in fixing the amount of damage, is this, that underwriters are not liable for any loss which may be the consequence of the duties or charges to be paid after the arrival of the commodity at the place of destination. And it has been held by the courts, and adopted in practice, that the calculation is to be made on the difference between the respective *gross proceeds* of the same goods when sound and when damaged, and not on the net proceeds. And a further reason for adopting this rule, is, that by taking the net proceeds as the basis, instead of the gross, it will happen that when equal charges are to be paid on the sound and damaged article, the underwriter will be affected by the fluctuation of the market, which ought not to be.

The desideratum is,—to obtain a uniform measure, or standard of adjustment, which can be made generally useful; the result of which will be the same, whether the markets rise or fall, or whether the charges be increased or diminished; and which, while it affords that indemnity to the assured to which he is fully entitled, does not subject the insurer to those claims with which, agreeably to his contract, he has no concern.

The loss of *duties* ought certainly to be made good to the merchant by the revenue; and this principle is acknowledged to be correct, because on his application and after some delay, a return is made to him; but this return, though it should be in proportion to the degree of deteri-

oration, generally falls short of his loss. Though the return of duty makes part of the merchant's indemnity, it being part of his loss in consequence of his having paid the full duty on the damaged goods, it has been contended because the gross proceeds include the duty, that the underwriter is entitled to this sum, or that it should be considered in the adjustment of the claim ;—otherwise, it is said, the merchant would be a gainer by the goods being damaged. But by an adjustment on a comparison of the *gross* proceeds of sale, and by that alone, the underwriter has no concern with the duties. The return of the duty ought therefore to be made good to the merchant ; he having paid the duty and borne the loss. On the assumption that the merchant was fully indemnified against *all loss*, by the underwriter, from the arrival of the goods in a damaged state, it is admitted that he would be a gainer by the sum in question. If an adjustment had been made on the basis of the *net proceeds*, the return duty ought to be paid over to the underwriter.

In the adjustment of claims for loss by damage, if the goods have been *wet*, which would increase their *weight*, the underwriters do not pay for this increase of weight. They are liable only for the invoice weight. The account-sales as rendered with the documents, gives the proceeds of the damaged goods, and if the weight be stated, it is generally the actual weight at the time of sale, which frequently far exceeds the invoice weight. The adjustment, therefore, should be made on the basis of the invoice weight.

It is highly desirable, in justice to the underwriters,

that the damaged goods alone should be sold, the sound portion being selected from them. It sometimes happens that the contents of a package are a set, or assortment, and that the abstraction of part from it leaves the remainder unsaleable, or saleable only at a reduced price, although it is not sea-damaged, and may therefore be said to be sound. Whilst therefore, there is great reason for endeavoring to confine the sale of damaged goods to the actual number of damaged pieces, the nature of things will not always permit this. The rule which should be followed is this:—Whenever the damaged pieces can be selected from the sound, without breaking up an assortment or leaving an unavoidable loss on the sound remainder, that course should be taken. But if it cannot be done without loss on the sound balance, then it is the assortment or the package which is the unity insured, and of which the underwriters guarantee the safety.

It is not usual where sea-damage exists in part of a cargo, the whole of which had been previously sold *to arrive*, to ascertain the *agreed price* for sound value, and the *actual sale* of the damaged goods after the ship's arrival, for their value in their depreciated condition; a valuation must be given of their price on the day on which the damaged goods were sold.

When the relative difference between sound and damaged goods is ascertained, it is next to be applied to the sum insured. It is not the actual amount of difference between sound and damaged, that the underwriters are necessarily liable for, but the proportion or ratio. Thus, suppose \$80 be insured on a package of goods, the

sound value of which proves to be \$100, and which sells in its damaged condition for \$80, the actual difference is \$20, or 20 per cent. loss. But the underwriters have not received a premium on \$100, but on \$80 only, the sum at which the package was mutually agreed to be valued at in the policy. They cannot, therefore, be made to pay the whole \$20, but they will pay 20 per cent. on the amount they have insured, viz: on \$80, which is equal to \$16. And, conversely, if the goods be insured for \$80, the sound market price \$60, their sale \$40; the actual difference is \$20, or $33\frac{1}{3}$ per cent. The underwriters having insured more than the actual value, are liable for the ascertained proportion of damage, and must pay $33\frac{1}{3}$ per cent., on \$80, or a sum of \$26 $66\frac{2}{3}$. But it is not often that the insured value exceeds the sound value. A shipper usually insures the invoice cost of the goods, to which are added all charges until the goods be on board the ship, the premium of insurance, also a reasonable percentage of expected profit, say 10 per cent.

The difference between a *valued* and an *open* policy, is this, in the former the insurable value is fixed, by the amount as stated in the policy; in the latter the insurable value is not fixed by the policy, but is left open, to be ascertained by the assured, in case a loss shall happen.

The rule usually adopted in practice, for ascertaining this value, is to take the invoice price as *prima facie* proof of the real insurable value, to which is added the shipping charges and premium of insurance, with the per cent. of advance as agreed in the policy, if any agreement be made.

The mode of adjustment, with this exception, is the same whether the policy be valued or open.

It has, however, been a matter of doubt with the courts and text writers, whether in the adjustment of a loss on cargo under an open policy, the value of the goods should be taken to be their prime cost, their invoice price, or their actual market value at the commencement of the risk. The difficulties in the way of adopting the market value as the insured value in an open policy, are in bringing forward proof of such value.

Mr. Justice *Washington*, in *Carson v. Marine Ins. Co.*, ably contended, that the market price of the goods at the commencement of the risk, is the true basis of calculation, and that the invoice price furnishes no rule of indemnity in any case where it exceeds, or is less than this market value. This was an agreed case, in which the only question submitted to the court was, whether, in case of a total loss of goods insured in an open policy, the invoice price, agreeing with the first cost, shall be taken as fixing the value; or, the current market price of similar goods at the time and place of shipping them; the latter being about 25 per cent. lower than the former. *Washington, J.* said: "it being admitted that there is no direct authority or custom in relation to a case precisely like the present, it must be decided upon an attentive consideration of the nature of the contract of insurance. What is it? An agreement by the insurer, in consideration of a certain reward, to stand in the shoes of the insured, and to indemnify him for any loss which may happen to the thing insured, *from certain perils enumerated* in the policy. This is effected by pay-

ing him, in money, the value of the property at risk, with the expenses incurred in putting it on board, duties &c. Suppose the property be destroyed within an hour after the risk has commenced, (and the time makes no difference in the principle), what does the owner lose? Precisely as much as it was worth, or would have commanded in market at the time and place it was shipped, including expenses, and no more. If the property cost him less than it was worth when shipped, he loses as well the first cost as the increased value, for which he is entitled to claim an indemnity from the insurer. If it cost him more, he loses the difference between the first cost and the diminished value when the property was shipped; but for this difference, he can have no claim for indemnity *under the contract*, because the loss did not result from *any of the perils against which an indemnity was stipulated*, but from an *unprofitable speculation, anterior to, and unconnected with, the contract*. Those who have contended for the value at the first port of discharge, have had much more reason on their side than the law of insurance, as understood in most countries, has sanctioned; for they have fairly argued, that the owner has lost, *by a peril insured against*, all that would have been gained by a successful termination of the voyage beyond the value of the property at the port where it was shipped. But this test of value is rejected, and perhaps rightly so, for the reasons assigned in the books. But it is impossible that the first cost can ever furnish a just rule of indemnity, where it exceeds or falls short of the actual value of the property when it is put at risk.

“ The invoice price is liable to all the objections which exist against the prime cost—and to an additional one, which, in the opinion of the court cannot be surmounted. It furnishes no rule of indemnity, in any case where it exceeds, or is less than, the market value of the article ; if the former, the insured is more than indemnified, by receiving more than it was worth ; if the latter, which it is presumed will seldom, if ever, happen, his indemnity would be in part only. But the strong ground of objection to this rule for appreciating the value of the property at risk, is, that it substantially destroys all distinction between valued and open policies, and this too in the face of one of the best established rules of evidence. It makes a private document created by one party to the contract, evidence against the other, as to a fact which is essential for the former to prove in the ordinary way. In the case of a valued policy, the insured is relieved from the necessity of proving the amount of his loss, because *both parties have agreed* that the property at risk was worth so much. But, to bind the insurer by the arbitrary value fixed in the invoice, is to subject him to *ex parte* evidence, furnished by his opponent in the cause, without his agreement, and even without his knowledge of its contents when the contract was entered into. And as it rarely happens, if ever, that an invoice does not accompany the cargo, it would follow that all policies would in fact be valued ; with this difference only, that what has hitherto been understood by valued policies, means nothing more than such as are valued by both parties, whereas open policies would be valued by one of the parties only.

“If neither the prime cost, nor the invoice price, can furnish a correct rule for estimating the value of the assured’s indemnity, will both together answer the purpose? If they differ, neither can be admitted, if the preceding course of reasoning be right. If they agree, then the contention for a choice is merely a dispute about terms. But if either or both vary from the real value of the property insured, and consequently furnish no just rule of indemnity, then it is impossible that their agreement can furnish any.

“Marshall has strangely embarrassed this subject, by using as synonymous, terms which are substantially different. ‘In England,’ he observes, ‘the loss is estimated according to the prime cost—that is, the invoice price.’ If they should happen to be the same, or must always be so, it was unnecessary to multiply words, in order to inform us that either might be taken. If they differ, which they frequently may do, then the two expressions cannot mean the same thing; and he has omitted to state, in such a case, which is to govern. He is much more intelligible, when he states, that ‘the first price of a thing does not always afford a sure criterion to ascertain its true value, because it might have been bought very dear, or very cheap. The circumstances of time and place, cause a continual variation in the price of things.’ Roccus is express upon the subject: ‘Where the contract,’ he observes, ‘is simply to pay the value of the goods in case of loss, the time of entering into the obligation is to be considered; and according to the then existing value, should the estimate be made. Thus,’ he adds, ‘the damage sustained by the assured in case of

loss, is not considered a source of profit.' The French rule seems to be the same; though in a valued policy, the insured is allowed to add the increased value between the prime cost and the market value. As to the rule of ascertaining the value of a ship, it is agreed on all hands, that the sum she was worth at the time of her departure, including certain expenses, is to govern; and the court can perceive no reason for establishing this rule, which does not apply to the case of goods. Upon the whole, it is the decided opinion of the court, that judgment must be rendered according to the market price of the property insured, at the time and place of exportation."

In *Le Roy v. United Ins. Co.*, 7 Johns, 343, hides, the prime cost of which was ten cents per pound, were invoiced at twelve cents per pound, the value at the time of shipment and effecting insurance. Held, that in ascertaining the amount of loss, the hides should be reckoned at ten cents per pound. The court, however, disclaimed any intention of laying down a general rule. *Thompson*, J. admitted "the prime cost of the goods might not in many cases, be a just rule of computation, as where they were not purchased with a view to an immediate exportation, and had remained on hand for a considerable length of time. But in matters of commerce, the plainest and simplest rules are always the best. And I should incline to think, that generally speaking, the prime cost would be the best rule by which to test the value of the subject. The prime cost is commonly the market price of the article."

In *Coffin v. Newburyport Mar. Ins. Co.*, 9 Mass.,

436, goods invoiced at their real value at the time and place of shipment, which was greater than their prime cost, were reckoned at the invoice price. See also, *Snell v. Delaware Ins. Co.*, 4 Dall., 430.

The difficulties, as we have said, in the way of adopting the market value as the insured value in an open policy, are in bringing forward proof of such value. And for this reason, it is usual, in practice, to take the invoice price as *prima facie* proof of the real insurable value. It cannot, however, be regarded as conclusive proof. Nor should the assured be prevented from invoicing the goods at their real, that is, market value, where they have risen in price since a purchase.

Having stated how a Partial Loss or Particular Average on cargo is usually adjusted, we will now state some of the charges which do or do not give a claim as for a Partial Loss against the underwriter on goods.

The underwriter on goods is not responsible, under the common form of policy, for the loss the merchant may incur by having to pay the same freight on sea-damaged goods arriving in bulk at their port of destination, as he would have had to pay had they arrived sound. *Caze v. Baltimore Ins. Co.*, 7 Cranch., 358; *Columbian Ins. Co. v. Catlett*, 12 Wheaton, 383; *Armroyd v. Union Ins. Co.*, 3 Binney, 437.

When goods are necessarily sold by the master, in a port of distress, to defray the expense of repairing the ship, the loss sustained from the sale by the shipper of the goods may be recovered by him against the owner of the ship, but cannot be claimed as an Average loss from the underwriter on goods. *Giles v. Eagle Ins.*

Co., 2 Metcalf, 140; *Moses v. Sun Mutual Ins. Co.*, 1 Duer, 159. But where the repairs are a subject of Contribution in General Average, the underwriters on cargo must contribute their proportion of the necessary sacrifice to raise the funds for the purpose of defraying the expense of the repairs, but they are not directly liable to the shipper for such loss.

Where the vessel is wrecked and the cargo is sent forward in another vessel to the port of destination, the underwriters are liable for a loss while the goods are in such substituted ship. *Winter v. Delaware Mutual Ins. Co.*, 30 Penn. State, 334. So if it be necessary on account of the loss of the ship to carry the cargo over land to tranship it, the underwriters are liable while this is being done. *Bryant v. Commonwealth Ins. Co.*, 13 Pick., 543, 555.

Underwriters are liable for no subject matter of insurance, which is destroyed by reason of its own inherent defects or tendencies. But this rule does not apply to tendencies which are called into activity only by a peril insured against. *Boyd v. Dubois*, 3 Camp., 133.

If goods be damaged by actual contact with sea-water, the underwriters are certainly liable. Most of the policies now in use contain a clause exempting the underwriters from liability for damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored or mouldy, unless the same shall be caused by actual contact of sea-water with the articles so damaged. Where the policy contains this clause, the burden is on the assured to show that the damage was caused by actual contact with sea-water.

If different articles be insured in the same policy under one valuation, free from Average under a certain per cent., it has been held there must be a loss equal to the per centage on the whole valuation; but if the articles be separately valued, a loss on one equal to the specified per centage on its value, renders the underwriters liable. *Ocean Ins. Co., v. Carrington*, 3 Comm., 357.

A similar question arises where a cargo consisting of bales, packages or parcels of the same kind of goods, is insured against total loss only, or free from Average under a certain per cent. In ENGLAND the law seems to be that if the packages be separately valued, the assured can recover for all that are totally lost, but not otherwise. 36 Eng., L. & Eq., 198. Some adjusters contend that the rule is the same in this country, but it has been decided otherwise in Pennsylvania. *Newlin v. Insurance Co.*, 20 Penn. State, 312. In this case insurance was effected on 104 bales of cotton, valued at \$50 per bale. There was a clause in the policy exempting the underwriters from Partial loss under five per cent. Four bales were lost by the perils of the sea, and the assured claimed to recover on the ground that each bale being separately valued, the contract was to be considered as an insurance on each bale, but the court held that the underwriters were not liable. In *Kettell v. Alliance Ins. Co.*, Sup. Jud. Ct., Mass. T. 1858, *Shaw*, C. J., speaking of the rule which allows a recovery for a total loss of part, said; "It is admissible only, we think, when goods of the same kind are separately invoiced and insured, or when insurance is made

specifically upon bales, boxes or other packages, valued and insured by the bale or package, or number of packages in parcels less than the whole." Whatever the law may be where each parcel is separately valued, it is certain in this country, that where this is not the case, there can be no total loss of part. *Biayo v Chesapeake Ins. Co.*, 7 Cranch., 415; *Moreau v. United States Ins. Co.*, 1 Wheat, 219; *Wadsworth v. Pacific Ins. Co.*, 4 Wend., 33.

Partial loss of freight.

A Partial Loss on freight is occasioned by the loss of the ship after a part of the voyage is performed, which makes it necessary to hire another ship to carry on the cargo to the port of destination, in order to earn freight; or a loss of a part of the cargo, whereby the ship is prevented from earning a part of her freight; and it does not appear to make any difference in this respect, that the loss is on an article of a perishable nature, and of more than ordinary liability to damage. As in case of tobacco being damaged and destroyed by sea-water. *Coolidge v. Gloucester Mar. Ins. Co.*, 15 Mass. R. 341; *McGaw v. Ocean Ins. Co.*, 23 Pick., 405.

CHAPTER IV.

TOTAL LOSS AND ABANDONMENT.

General doctrine of Total Loss and Abandonment.

These topics are usually considered together, for the reason that, in practice, much the larger part of losses which are total, become so by abandonment.

As insurance is for the purpose of protecting the merchant from severe and heavy losses arising from shipwreck or disaster, so abandonment is intended to restore to the owner, without delay, his capital, and thereby enable him to engage in some new mercantile adventure. Long interruption to a voyage, and uncertain hopes of recovery, would often be ruinous to the business of the merchant; and therefore, when there is a forcible dispossession or ouster of the owner of the ship, as in cases of capture; when there is a moral restraint or detention, which deprives the owner of the free use of the ship, as in case of embargoes, blockades and arrest by sovereign authority; when there is a present total loss of the physical possession and use of the ship, as in case of submersion; when there is a total loss of

the ship for the voyage, as in the case of shipwreck, so that the ship cannot be repaired for the voyage in the port where the disaster happens ; and, when the injury is so extensive, that by reason of it the ship is useless ; or, if the cargo be so damaged as to be of little or no value, the insured may abandon the subject to the underwriter, and call upon him to pay a total loss.

When an abandonment has been made by the owners to the underwriters, the latter stand in the place of the owners, and take the subject to themselves, with all the chances of recovery and indemnity.

An abandonment can be accepted or refused by the underwriter. It is generally refused by him, because admission of the abandonment places him in a somewhat different position with the assured, and he generally wishes to avoid any accession of responsibility, particularly as abandonments are frequently made when facts relating to the loss of the ship and goods are very imperfectly known. But, after all, the merits of the case are decisive for or against an underwriter. If he accept abandonment, and it afterwards turn out that the facts upon which it was made were untrue or did not exist, the abandonment is nothing ; does not bind in any way ; has no effect. On the other hand, although the underwriter refuse acceptance of abandonment, yet if there were valid grounds for ceding the property to him, the notice given him will be sufficient ; and in many cases where the loss is such that no question can arise upon it, the notice itself is unnecessary, and the loss can be claimed without it.

It is a universal rule, that all rights, claims and

interests, which are indissolubly connected with the property insured, pass to the insurers by an abandonment of the property, so far as the same belong to the assured, and to the extent of the interest covered by the policy. As a right to Contribution for General Average; all claims for negligence or any misconduct causing injury to the property, as for collision, or for injury to goods; or for any indemnity from a foreign government. But if the underwriters refuse to accept an abandonment, and the loss be settled by a compromise, the right of indemnity does not pass, so, if no abandonment be made, but the loss be settled as a Partial Loss, the underwriters have no claim on the assured for any subsequent benefit derived from the adventure. So too, a mortgagee transfers to the underwriters by abandonment, so much of the debt due to him as is paid by the underwriters. An action at law to enforce a right which the insurer has acquired by subrogation, must, generally, be in the name of the party, whose place the insurer has taken. In equity, however, the insurer may sue in his own name. *Garrison v. Memphis Ins. Co.*, 19 Howard, 312.

The salvage, of course, belongs to the insurers; but if it be encumbered by any charge or lien by a peril against which they have insured, they are of course answerable for this, and bear the loss. But if the salvage have burdens, charges or liens upon it, springing from perils which are not insured against, this must be the loss of the assured, who must discharge these burdens, or pay or allow to the underwriters the sum they pay, or are bound to pay, by reason of these burdens.

They take the ship, by this abandonment, free from any lien for seamen's wages earned before the time from which the abandonment takes effect, but are, of course, liable for wages earned afterwards, by labor on board the ship, because this is a service rendered to them, and in and about the property. *Hammond v. Essex F. & M. Ins. Co.*, 4 Mason, 196. 2d *Parsons*, 418.

The insurers take the salvage property subject to the charges and expenses incurred in saving it; and it seems that this may exceed the value of the salvage and still the underwriters be bound, provided the expenses and charges were incurred by the assured while laboring in good faith and with reasonable discretion, for the recovery and security of the salvage and the consequent benefit of the insurers; for this they are authorized, if not required, to do, by the usual policies of insurance, and would probably be, by the principles and policy of the law of insurance, even if the policies contained no such provisions. 2d *Parsons*, 419: *Barker v. Phœnix Ins. Co.*, 8 Johns, 307; *Jumel v. Marine Ins. Co.*, 7 Johns, 412; *Lawrence v. Van Horne*, 1 Caines, 276; *Potter v. Providence Wash. Ins. Co.*, 4 Mason, 298.

When there is a total destruction of the thing, abandonment is unnecessary. If the loss be so absolute as to be beyond all question, abandonment has little real effect, and the want of it little prejudice. It is in doubtful and questionable cases, where it is of importance.

No especial form of abandonment is prescribed by law or usage. It is the spirit of the act, rather than the letter, that is to be considered. Notice of abandonment,

however, is usually given in writing, but even this does not seem to be absolutely necessary. It is customary for the assured to write a letter to his underwriters giving them notice that he abandons the interest insured, to them; and he frequently gives them what information he possesses as to the cause and occasion of abandonment. The more distinct and direct the manner of giving notice the better; but sometimes an indirect communication, if it be proved afterwards that the underwriters understood it and acted on it, will be sufficient. But generally the notice should state substantially the grounds on which the abandonment is made; and the cause stated must be a peril within the policy.

It is important that the notice should be given to the underwriters in proper time; because it is only just that, if I throw up my property and leave it on their hands to dispose of as they think proper, it should be done when there is yet an opportunity of their acting on my abandonment, and of taking measures to secure and dispose of the property which has in this manner become their own. *Pierce v. Ocean Ins. Co.*, 18 Pick., 93; *Marshall v. Delaware Ins. Co.*, 4 Cranch., 202 2 Wash. C. C., 54; 1 *Caines Cas.*, 21; 1 *Caines Cas.*, 28; 3 *Caines*, 155; 9 *John*, 26; 4 *Cowden*, 222; 3 *Wendell*, 658; 1 *Mason*, 241; 3 *Mason*, 429; 5 *Cowen*, 63; 4 *Dallas*, 446; 3 *Mass.*, 238; 6 *Mass.*, 479; 3 *Mason*, 27; 5 *Gill & John*, 159; 12 *Peters*, 378.

If the facts be such as to justify an abandonment at the time it was made, the subsequent recovery of the property, before the assured has taken legal measures

for enforcing his claim, does not divest him of his right to insist on his abandonment, and recover as for a total loss. An abandonment once rightfully made is conclusive, and the rights following from it are not divested by any subsequent events which may change the situation of the property. *Peele v. Merchants' Ins. Co.*, 3 Mason's Rep., 27; *Marshall v. Delaware Ins. Co.*, 4 Cranch., 202. The rule is the same as in the UNITED STATES, in this respect, in FRANCE, GERMANY and other parts of the CONTINENT. See *Emerigon*, chap. xvii, sec. 4, vol. ii., p. 222, ed. 1827; *Boulay-Paty*, *ibid*, 223; *Code de Commerce*, art. 385; *Pardessus Cours de Droit*, Com., vol. iii., part iv., tit. v., chs. 3 and 4, p. 423, ed. 1841. In ENGLAND, the law is different. There, the established rule is, that, even although the facts were such as to justify the assured in giving notice of abandonment at the time he did so, yet he cannot insist on such notice, and recover as for a total loss, if the thing insured be restored, before he commences his action, in such a state that he may reasonably be expected to take possession of it. *Bainbridge v. Neilson*, 10 East., 329; *Patterson v. Ritchie*, 4 M. & Selw., 393; *Brotherton v. Barber*, 5 M. & Sel., 418; *Naylor v. Taylor*, 9 B & Cr., 725.

Lord *Mansfield*, in *Goss v. Withers*, 2 Burr, 683, thus states the utility of an abandonment: "To all, indeed, who are engaged in commercial speculations, it is of the last importance to have a ready and quick command over their capital, so as to be enabled at once to withdraw it from any adventure that appears likely to be losing, and invest it in another that promises to

be lucrative. Suppose, then, a merchant or ship-owner to have received information of some marine casualty, such as capture or stranding, which renders the total loss of his property highly probable, but not absolutely certain—what is he to do under such circumstances? To have his funds locked up during the whole time he is waiting the ultimate issue of the accident would be almost as disastrous as the absolute total loss of his property; in fact, more so, for in the latter case he would have an immediate claim on the underwriter for the amount of his subscription. The claim, therefore, which he would have a right to make in case of an *absolute* total loss, the law allows him to make in these cases of *probable* and highly imminent total loss; it allows him to release himself from his embarrassment, and deal with the underwriters on the same terms as though a total loss had actually occurred, on condition of his abandoning to them all his interest in the subject insured, and all his rights of recovering it.”

Definition and general rules of Constructive Total Loss.

A loss may be either *total* or *constructively total*. A *total loss* is, as the words imply, an entire destruction of the subject insured, whether it be the ship, or the goods laden on board.

As we have already seen, a *constructive total loss* in insurance law is that which entitles the assured to claim the whole amount of insurance, on giving due

notice of abandonment ; and that is, generally speaking, a case of constructive total loss where the thing insured has been reduced to such a state, or placed in such a position by the perils insured against, as to make its total destruction or annihilation, though not inevitable, yet highly imminent, or its ultimate arrival under the terms of the policy, though not utterly hopeless, yet exceedingly doubtful. In such cases, if the assured wish to recover for a total loss, he must, as a necessary preliminary, give due notice of abandonment ; that is, an explicit intimation to the underwriters that he offers to cede or abandon to them, unconditionally, his whole interest in the thing insured, or the remains of it, as far as it is covered by the policy ; and this notice he must give in reasonable time.

The assured, before giving notice of abandonment, is not bound to wait for full and accurate information, but may give it at once upon a mere report of capture, detention, innavigability, or any other casualty, which, supposing the intelligence to be well founded, would be a clear case of constructive total loss. But, in order to make a notice of abandonment valid, not only must the information on which it is founded prove true, but it must also be justified by the state of facts existing at the time when it is actually given.

The law in ENGLAND, and also in FRANCE, is, in this respect, the same as our own. 10 *East*, 341.

The facts as they exist at the time a notice of abandonment is given, must be such as to justify it ; and if they be so, the rule is, that an abandonment once rightfully made is binding and conclusive between the

parties, and the rights flowing from it become vested rights, and are not divested by any subsequent events. *Peele v. Merchants' Ins. Co.*, 3 Mason, 27; *Marshall v. Delaware Ins. Co.*, 4 Cranch., 202; 8 Mass., 502, 536; 9 Pick., 484.

Constructive Total Loss on ship.

The expenses of restoring what has been destroyed and of repairing what has been injured about a ship, are the most common form of a ship's constructive death. The difficulties of carrying on repairs, or of procuring materials for those repairs; the inability to raise means for paying the necessary disbursements arising in a foreign port; or the exorbitant rate of interest demanded for money required for such disbursements, are the usual proximate causes which lead to the abandonment of a ship to her insurers.

It is a fixed rule, that if the ship be injured by the perils insured against so as to require repairs to the extent of more than *half her value*, (*nothing in the policy to the contrary*), the assured is entitled to abandon as for a total loss. *Deblois v. Ocean Ins. Co.*, 16 Pick., 303, 309, 310. In ENGLAND, the assured can abandon, only when the cost of repairs exceeds *the full repaired value*.

The policies at present in use in New York and New England, however, require that the ship must receive injury to the amount of three-quarters of her insured value, to enable the owner to abandon her to the under-

writers and claim as for a total loss. Hence, if a vessel be valued at \$20,000, and it turn out by survey and estimate, that it will cost to repair her \$12,000, and it appear that the wages and provisions of the crew, port charges, &c., will be \$3,000. Under an adjustment as of a partial loss—

The cost of repairs being		\$12,000
One-third is deducted for new		4,000
Leaving		\$8,000

The insured value being \$20,000, half is \$10,000, and hence there can be no abandonment under either a New York or New England policy.

The expense of repairs is, in general, to be estimated at the place where they were actually made, or where they would have been made, if made at all. But if a vessel can be partially repaired at a port of distress, so that she can be taken to another port and then fully repaired at a less expense than at the first port, it would seem to be the duty of the assured to do this, and consequently, the underwriters are liable only for the lesser expense. *Center v. American Ins. Co.*, 7 Cow., 564. But the cost of navigating the vessel from the port of distress to the port where the final repairs are to be made, is to be added, if such a port be one to which the vessel would not have gone in the course of the voyage. *Lincoln v. Hope Ins. Co.*, Sup. Jud. Ct., Mass. T., 1857.

If the assured abandon, the salvage or proceeds, belong at once to the underwriters, and are afterwards at their risk; if he do not, they are at his risk, because if he claim for a total loss, he must in any event, ac-

count for them. Thus, in *Smith v. Manufacturers' Ins. Co.*, 7 Met., 448, *Shaw*, C. J., said: "An abandonment changes the character of the master. It relates back to the time of loss; and as the master is authorised to labor &c., in saving, for the benefit of all concerned, if there have not been an abandonment, he is the agent of the owner and assured, and if he receive money it is for their account; if he squander or waste it, it is their loss. But, if there have been an abandonment on good grounds, it relates back, and makes the master the agent of the underwriters from the time of the loss, so that, if the salvage have been squandered, it is their loss." If there have been no abandonment, "the salvage is not a set-off, not something belonging to the defendants, to be used to balance the plaintiff's total demand; but it is a sum belonging to the plaintiff, in his own hands, which diminishes his demand *pro tanto*, and to the same extent diminishes the amount he is entitled to recover."

If, by perils of the seas, the ship be so damaged as to be incapable of proceeding on her voyage, or keeping the sea without repairs, at a place where such repairs cannot be procured,—either from want of materials, or from the master's total inability, after using his best exertions, to obtain money or credit for the purpose of raising funds to repair—that is a case of constructive total loss on ship. *Peele v. Merchants' Ins. Co.*, 3 Mason, 27; 4 *Cranch*, 45; *Bradlie v. Maryland Ins. Co.*, 12 Peters, S. C. R., 400; *Wood v. Lincoln & Kennebec Ins. Co.*, 6 Mass., 479; *Patrick v. Com. Ins. Co.*, 11 John, 13; *King v. Middletown Ins. Co.*, 1

Conn., 184; *Church v. Marine Ins. Co.*, 1 Mason, 341; *Sewall v. U. S. Ins. Co.*, 11 Pick., 90; *Abbott v. Broome*, 1 Caines, 292.

The questions, arising out of the above paragraph, are, what is the measure of diligence that, for the purpose of repairing the vessel, when repairs are necessary, the master is bound to exercise? When unprovided with funds, what are the efforts that he ought to make? What the means he is bound to employ to supply the want?

If the master cannot raise the sums that are needed, upon the credit of his owner or his own, the law not only gives him the power, but makes it his duty, to raise them upon the security of any part or of the whole of the property and interests under his control. He may pledge vessel, freight and cargo, by bottomry, respondentia, or mortgage. And it is only when all these means have been resorted to with proper diligence, and have proved ineffectual, that he is justified in breaking up the voyage, or that his owner, if insured, has any right to abandon. But it by no means follows, that the diligence and efforts of the master, in procuring the means of repair, are, in all cases, to be limited to the port in which the disabled vessel has found a refuge. Although neither the proper materials nor workmen are there to be found, nor the requisite funds there to be procured, it is by no means a necessary consequence that he may at once abandon the voyage, and sacrifice, by an immediate sale, the property entrusted to his charge. His obligation to repair the vessel, if reparable at an expense of less than half her value,

may still subsist, and his failure to perform the duty operate to discharge the underwriters from all liability beyond the payment of a partial loss. If, without any prejudicial delay, or increase of expenses beyond a moiety of the value, the want of materials or workmen could have been supplied from a neighboring port, or the necessary funds have been obtained by a communication with his owner or consignee, the conduct of the master in breaking up the voyage and selling vessel and cargo, could not be justified, and would furnish no ground for the recovery of a total loss. The breaking up of a voyage ought never to be sanctioned when it is certain that the ship-owner, if uninsured, would have continued to prosecute it; nor, consequently, the abandonment of the vessel, as innavigable, ever be sustained when it is certain that the owner, if uninsured, would have elected to repair.

Lord *Ellenborough*, in *Anderson v. Wallis*, 2 M. & Sel., 240, said: "An abandonment is never to be authorized, except when at the time the loss was actually total, or in the highest degree probable." And if we analyze the cases that have settled the law, as it now prevails in England, we shall find that it is this principle that runs through, explains and justifies them all. To select an example from each class of cases: When the vessel insured is captured, there is an actual total loss; but as she may be recaptured or restored, an abandonment is necessary to warrant its recovery; a title must be vested in the insurers to give them the benefit of the "*spes recuperandi*." But when the vessel is stranded, the question, whether the loss shall be

deemed partial, or so far total as to warrant an abandonment, will depend upon the nature and extent of the peril in which the vessel is involved, and the probable difficulty, hazard and expense of attempting to deliver and repair her. When it appears that by proper exertions, she might have been gotten off, and have been fully repaired at a moderate cost, the abandonment is void, and a partial loss only can be recovered; and to warrant the recovery of a total loss, it must be proved that the delivery of the vessel from the peril was, upon reasonable grounds, judged to be impracticable, or not to be effected, unless at an expense that would absorb her value. In other words, it must be proved, that a loss actually total, although not then existing, was in the highest degree probable. *Fontaine v. Phœnix Ins. Co.*, 11 Johns, 295; *The "Sarah Ann,"* 2 Sumner, 255; *Ruckman v. M. L. Ins. Co.*, 5 Duer, 366.

Where the ship, by the perils insured against, is reduced to such a state of innavigability that a prudent owner, if on the spot and uninsured, in the exercise of the best and soundest judgment that could be formed under the circumstances, and acting for the benefit of all concerned, would rather sell her as she lies, than attempt to extricate or repair her, either because there is no reasonable chance of ever extricating her from the peril at all, or because the cost of repairing her, so as to make her a navigable ship again, would exceed her value when repaired, this amounts to a case of urgent necessity, which will justify the master in selling, and to a case of constructive total loss, which will entitle the assured, on abandonment, to recover the whole

amount of insurance. 2 *Arnould*, 1091; *Robinson v. Commonwealth Ins. Co.*, 3 Sumner, 220.

In the case of *Scull v. Briddle*, 2 Wash. C. C., 150, Mr. Justice *Washington* held, that in case of extreme necessity the master may sell in a *foreign country*, rather than let the property perish, but not in the country where his owner lives. This was held in the case of a sale of the materials of a wrecked vessel, which there was no immediate necessity of selling, but which might have been stored in a place of safety. But in the *Brig "Sarah Ann"*, 2 Sumner, 215, Mr. Justice *Story*, holding a contrary doctrine, remarked, that "if such an urgent necessity do exist, as renders every delay highly perilous, or ruinous to the interests of all concerned, the duty of the master is the same, whether the vessel be stranded on the home shore or on a foreign shore, whether the owner's residence be near or be at a distance. I am aware of the doctrine maintained by my brother, the late Mr. Justice *Washington*, in *Scull v. Briddle*, 2 Wash. C. C., 150; and, unless it is to be received with the qualifications above stated, I cannot assent to it." This opinion of Mr. Justice *Story* has been affirmed by the Supreme Court of the United States, in the case of *New England Ins. Co., v. Brig Sarah Ann*, 13 Peters, 387, where the court says: "The true criterion for determining the occurrence of the master's authority to sell, is the inquiry, whether the owners or insurers, when they are not distant from the scene of stranding, can, by the earliest use of ordinary means to convey intelligence, be informed of the situation of the vessel, in time to direct the master, before she will

probably be lost. If there be a probability of loss, and it be made more hazardous by every day's delay, the master may then act promptly, to save something for the benefit of all concerned, though but little may be saved. There is no way of so doing more effectually than by exposing the vessel to sale; by which the enterprise of such men is brought into competition as are accustomed to encounter such risks, and who know from experience, how to estimate the probable profits and losses of such adventures."

With regard to a total loss by sale of the ship by the master, it will be well to consult the following authorities:—

In the case of *New England Ins. Co., v. Brig Sarah Ann*, 13 Peters, Sup. Ct. Reps., 215, it was held, that a sale by the master of a stranded vessel, made in good faith, from necessity, is valid. Good faith includes the use not only of his best discretion and judgment concerning the necessity of the sale, but the acquisition of the best local information in his power, bearing on the emergency, and the previous employment of any and all reasonable means at his command, to get the vessel afloat and out of danger. The necessity must arise from an impending peril, to which the vessel is exposed in her then condition, from which the master has no reasonable means of relieving her, and by which, it is probable, in the opinion of persons competent to judge, that the vessel if not relieved, will be destroyed.

The mere facts that, as events turned, the vessel was relieved, and that the cost of her repairs and removal was not very great, will not disprove the necessity for

a sale, or the competency of the master or of his advisers. The power of the master to sell is not limited to cases of necessity in foreign countries, or even out of the limits of the State where the owners reside ; but he should not sell in any case without first giving notice to his owners, if the circumstances admit of the necessary delay. He may sell the sails and rigging, though landed, if a sound discretion requires them to be sold when the hull is sold.

In *Patapsco Ins. Co., v. Southgate*, 5 Peters, S. C. R., 490, it was held : To justify a sale of a vessel insured, necessity and good faith on the part of the master, must concur ; and the necessity is not to be inferred from a sale by a skilful master acting in good faith ; it must be determined from the other circumstances.

In *Greeley v. Tremont Ins. Co.*, 9 Cushing, Sup. Ct. Mass. R., 420 *Shaw*, C. J. said, “ If a ship, after disaster, remain *in specie* under the control of the assured, and there be not in fact, a total loss, independent of a sale by the master, such sale cannot make it so.”

In *Hall v. Franklin Ins. Co.*, 9 Pick. R., 466, it was held ; The necessity which will justify a master of a ship in selling her, is one in which he has no opportunity to consult the owners or insurers, and which leaves him no alternative. And this doctrine will be found to pervade the decisions in 12 *Pick.* 286 ; 13 *Pick.* 543 ; 18 *Pick.* 83.

In 1st *Parsons on Cont.* 66, it is said “ The master may sell the property entrusted to him in a case of extreme necessity, and in the exercise of a sound discretion. Nor need the necessity be actual in order to justify the

master and make the sale valid. If the ship were in peril which, as estimated from all the facts within his means of knowledge, was imminent, and made it the most prudent course to sell the ship as she was, without further endeavors to get her out of her dangerous position, this is enough, and the sale is justified and valid although the purchasers succeed in saving her, and events prove that this might have been done by the master."

In 2d *Smith's Leading Cases*, 576, the author of the notes says: "In order to make out a case for a sale without express authority, it would appear necessary to show that the property at risk has been placed in a position of such imminent danger, that it may be destroyed or materially injured, before recourse can be had to those to whom it belongs; unless the intervention of other means be resorted to than those which can be commanded by the master."

In *Gordon v. Massachusetts F. & M. Ins. Co.*, 2 Pick. 263, in regard to the weight which should be given to a survey of a vessel made after injury, in order to determine what it is the duty of the master to do with her—*Parker*, C. J. said: When a vessel has been so far injured by a peril of the sea as to make a survey necessary, and the master with perfect good faith, calls such a survey, and the persons appointed to take it are competent in point of skill and wholly disinterested, and they, after a full and sufficient examination of the vessel, find her essentially injured, and come to a fair conclusion that, from the high price of materials and labor, or the difficulty of procuring them, the expense of repairing

will be more than the worth of the vessel after she is repaired, and therefore, they advise, for the interest of all concerned, that the vessel be sold, in such a state of things as this, it seems to me that a moral necessity is imposed on the captain to act according to their advice. The jury in passing on the question must take into consideration the opinion of these persons thus called on to aid the master by their advice, and that opinion is entitled to very considerable weight. If they acted fairly, and the captain acted fairly, his acts in conformity with their opinions will be justified unless it shall be made to appear by those who contest the loss, that the facts on which they founded their opinion were untrue, or the inferences they drew from those facts were incorrect, and the burden of proof should be on those who would impeach their proceedings."

In *Prince v. Ocean Ins. Co.*, 40 Maine, 481, after a thorough review of all the authorities, the court held that the jury were rightly instructed when they were told that the sale would be justified if there were an apparent necessity for it, and that no qualification to intensify the word "necessity" was necessary. *Shepley, C. J.* in this case, p. 492, speaking of the power of the master, said: "He is under a moral obligation to pursue that course and make that decision which will best promote the interests of all for whom he has become the agent. He must do wrong if he do not do so. He has no alternative left, and must sell, if in the faithful discharge of that duty, he determines that the calamity will be most alleviated, and the interests of all be best

served by a sale. A moral necessity for a sale can mean no more."

The above cases sufficiently show that the master has power to sell only from necessity, and the sale is valid therefore when made from an actual and stringent necessity; but this necessity must be judged of from the facts and probabilities existing at the time and apparent to the master, and not by the result. Nor is the master at liberty to sell without notice to, or the advice of, the owners, provided he be so near them that he can delay the sale for the purpose without endangering a greater loss. And if he cannot thus communicate with his owners, but know that the ship is insured, and can communicate with the insurers, he ought to do so.

If the master sell, he cannot become the purchaser himself; and if the port warden, surveyor or any person authorizing or officially promoting the sale, should buy, it would be a most suspicious circumstance, although not perhaps sufficient, of itself, to avoid the sale. The general rule is that a vendor cannot become a vendee, and that a sale in such a case is void, and the parties have no greater privileges than before the sale. *Church v. Marine Ins. Co.*, 1 Mason, 341; *Barker v. Marine Ins. Co.*, 2 Mason, 369. In *Hall v. Franklin Ins. Co.*, 9 Pick., 466, the question arose, whether a sale at which one of the owners, but not the plaintiff, became the purchaser, was valid? The jury were instructed that the purchase by him could not affect the right of the other owners to recover when the case came before the full bench, the sale was held invalid on other

grounds, and this question was not decided.

If in a port where the assured should have funds, the master sell the vessel to prevent a forced sale by process of law to pay off workmen who have a lien on the vessel, the assured cannot abandon, because the loss was caused by his neglect. *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer, 342, 368.

But if the repairs would cost less than half of the ship's value, but be impossible because the master has no funds and can raise none by bottomry or otherwise, and the owners or insurers be too distant for advice or assistance, the master may sell the vessel. *Allen v. Commercial Ins. Co.*, 1 Gray, 154, 158; *Williams v. Smith*, 2 Caines, 13; *Ruckman v. Mer. L. Ins. Co.*, 5 Duer, 342.

If however the vessel be at a port of destination this rule does not apply, for the owner is obliged to furnish funds at such a place. In *Allen v. Commercial Ins. Co.*, 1 Gray, 154, the vessel arrived at her port of destination in such a condition, that her estimated repairs were \$5,248. This sum, after deducting one-third, new for old, was less than half her value. The owners were present, but as they had no funds, the vessel was sold. Held, that the underwriters were not liable for a total loss. And even in a port of necessity, the master is not authorised to sell the vessel for want of means to repair her, if such means can be obtained by the exercise of proper diligence, either on the credit of the owner, or by pledging as security a part or the whole of the interest under his charge. And indeed, the diligence and efforts of the master are not to be limited, in all cases, to the

port in which the vessel has found a refuge. See also 5 Duer, 342 ; 20 Wend., 287.

A question has been raised in both the *United States* and *England*, whether, in the case of an *old and decayed* ship, the jury, in estimating the probable cost of repairs, with a view to ascertain whether they would exceed the sum required to enable the owner to abandon her to the underwriters, are to be directed to exclude from their estimate the cost of all such repairs as the decayed state of the ship may have rendered necessary. The better opinion in both countries, seems to be, that, if the necessity of the repairs may fairly be referred to the perils insured against, and the ship be shown or admitted to have been seaworthy when she sailed, and repairs have been rendered necessary, in the course of the voyage, by the perils insured against, the increased expense of making such repairs, arising from the old or decayed state of the ship, is not to be deducted in calculating whether the cost of repairing will exceed a moiety of the ship's insured value after the usual deduction of one-third new for old (or as the rule is in England, the ship's value when repaired).

In *Depeyster v. Col. Ins. Co.*, 2 Caines, 85, the vessel's bottom at the time of sailing, was a little worm-eaten, but she was a seaworthy vessel. She was afterwards sold at a port of distress, it being the opinion of the surveyors that it would have cost more than the vessel is worth to repair her. At the trial before the jury, the judge charged "that if, in calculating the repairs, they believed any were necessary on account of injuries received from worms prior to the vessel's sailing,

the expense of such repairs should not be included in the estimate." This direction was held to be incorrect, and the rule was laid down that if repairs were rendered necessary by a peril insured against, they ought to be made, without any other examination of the antecedent state of the vessel, except to determine the fact of her being seaworthy. *Livingston*, J. said: "It may at first seem hard to hold an insurer in any way liable for the defective nature of the thing insured, but so long as the subject of insurance be seaworthy, is it not part of his contract that in case of accident, that he will defray all the expense of placing her in *statu quo*? If she be totally lost, he pays the whole sum subscribed without any inquiry into her condition, any further than to ascertain whether she were seaworthy; so if she be partially injured, the repairs being rendered necessary by a peril insured against, they ought to be made, without any other examination as to her antecedent state, except to determine the fact of her being seaworthy; for, unless she had been further damaged by one of the perils insured against, no repairs at all would have been necessary. I adopt, as a general rule, that if the old injuries be not such as to render the vessel innavigable, no deduction, in case of accident, is to be made on that account from the cost of repair, and therefore think the judge was mistaken in directing the jury to make the distinction he did."

In *Depau v. Ocean Ins. Co.*, 5 Cowen's R. 63, C. J. *Savage* said: "That the insurer is not at liberty to show that the vessel had received part of the injury anterior to the voyage, has not been disputed since the decision of

Depeyster v. The Col. Ins. Co. unless she were, in fact, unseaworthy.”

This seems to be the intent of the language of Mr. Justice *Story* in *Peele v. Merchant's Ins. Co.*, 3 Mason, 27, 77, and in the English cases of *Thompson v. Calvin*, Ll. & Wels, 140, and *Phillips v. Nairne*, 11 L. J. C. Pl., 194.

The doctrine intended in these cases must be that if worm eaten timbers be broken or injured by the perils insured against, still the insurers shall pay for the repairs, although it would have been necessary to have made the repairs very soon, had no damage happened in consequence of these perils. In many instances the qualities of the subject, and the use to which it is put, or the ordinary accidents incident to it in the situation in which it is placed may concur with the perils insured against in producing damage; still, if the damage can be satisfactorily attributed to the operation of those perils, the insurers are liable, unless they be discharged by some fault or stipulation by the assured.

The doctrine on the subject is very distinctly laid down in a Louisiana case, (*Hyde v. La. State Ins. Co.*, 2 Marin, N. S. 410). An insured steamboat was damaged by running foul of another, so that it would cost more than she was worth to repair her and make her seaworthy, but the expense of the repairs of the damage done would not be equal to half of the amount at which she was insured in the policy. Had the accident not happened, the boat might have run, in the route in which she then was, eighteen months. Mr. Justice *Porter*, giving the opinion of the court, said: “We apprehend

the rule to be, that in case an injury be received by an old decayed vessel, which, independent of the accident, might have run for some time, if the repairs cannot be put on her in such a manner that the unsound part can be used as formerly, without an expense equal to one-half of the value, or, in other words, where the injury which the insurers are obliged to make good is the cause of the decayed parts requiring repairs, then the assured may abandon. But if repairing the injury which has arisen from one of the perils insured against will replace her in the same situation she was in before, no matter how unsound all the other parts may be, then the insured shall not have this right, for all they can ask is, that the boat may be placed in *statu quo*. The underwriters are not obliged to make good the decayed and broken parts of a vessel, unless the accident which happens within the peril insured against be of such a nature as will not admit of repairs being placed on her, so that the decayed and rotten parts may be used as formerly." The court was accordingly of opinion that this was not a case of total loss.

Under the clause in the policy "that the assured shall not have the right to abandon the vessel for the amount of damages merely, unless the amount, which the insurer would be liable to pay under an adjustment as a partial loss, shall exceed half the amount insured," it has been held that in order to authorise an abandonment for such cause, the Particular Average must amount to that proportion of the value of the ship independently of the General Average charges. *Orrok v. Commonwealth Ins. Co.* 21 Pick. 456; *Hall v. Ocean Ins. Co.*, 21 Pick.,

473; *Reynolds v. Ocean Ins. Co.*, 22 Pick., 191; *Sewall v. U. States Ins. Co.*, 11 Pick., 90. So, expenses incurred, in order to ascertain the extent of the loss, are not to be included. *Hall v. Ocean Ins. Co.*, 21 Pick., 472. So the wages and provisions of the officers and crew, while the ship is undergoing repairs, are not to be included in the estimate for ascertaining whether the cost of repairs will exceed the half value. But a reasonable allowance should be made for the custody of the vessel, if necessary, during such repairs, and for superintendence, which allowance should be charged to the account of labor. *Hall v. Ocean Ins. Co.*, 21 Pick., 472.

The assured is entitled to have the damage, done by the peril insured against, completely and thoroughly repaired, and it is not enough, to prevent the assured from abandoning, that the vessel could be rendered seaworthy at an expense less than fifty per cent. *Lincoln v. Hope Ins Co.*, Sup. Jud. Ct. Mass., March T., 1857.

If, at the time the abandonment is made, the master have commenced to repair the vessel, the abandonment is invalid, and the assured can recover only for the expense incurred, although it exceed half the value of the vessel. This proceeds on the ground that the state of facts existing at the time of the abandonment determines the right of the assured to abandon. *Humphreys v. Union Ins. Co.*, 3 Mason, 429; *Dickey v. Am. Ins. Co.*, 3 Wend., 658.

Mr. Justice *Story*, giving the judgment of the Supreme Court of the U. States in *Bradlie v. Maryland Ins. Co.*, 12 Peters, 405, decided that, in case of a loss

less than total, by reason of innavigability, if the master have bottomried the ship, in order to raise funds for repair, the underwriters have nothing whatever to do with the bottomry bond, but are simply bound to pay the Partial Loss, including their proportionate share of the extra expense of obtaining the money in that mode, supposing no other way of raising it to have been practicable.

Where a bottomry bond executed at Hamburg, was given at a premium of twelve and a half per cent., and the bottomry holder agreed to give it up, if the sum advanced, and common interest were promptly paid, and the agent of the bottomry holder received a draft from the owners at Hamburg for the amount and common interest, and charged a commission for endorsing the draft, and the bond was thus taken up, the underwriters were held liable for the interest and commission, and bound to pay them as part of the loss, since they thereby obtained the benefit of the surrender of the twelve and a half per cent. premium; and they were not entitled to the benefit without partaking of the burthen; but it was also held, that one of the owners who transacted the business, and gave the draft, and took up the bottomry bond, as agent for all the owners, was not entitled to claim against the underwriters any commission on his disbursement or for his services. *Peters v. Warren Ins. Co.*, 1 Story C. C., 464. As to this last point, respecting commissions, see *Brooks v. Oriental Ins. Co.* 7 Pick., 259; *Sage v. Middletown Ins. Co.*, 1 Conn., 242.

A question often arises, whether an offer and readiness on the part of the underwriters to repair a damag-

ed ship, and their actually repairing and restoring it in time for prosecuting the voyage, or in reasonable time, if no voyage be pending, at their own expense, whatever the expense may be, whether over or under fifty per cent. will annul an abandonment, and cancel and satisfy and discharge the claim for the loss?

In *Hart v. Delaware Ins. Co.*, 2 Wash. C. C. R. 346, *Washington*, J. expressed the opinion that, "if the vessel were injured more than one half its value, the assured had a right to claim for a total loss, unless the underwriter offered to pay the amount of repairs at all events. But he must engage to pay what may be necessary to fit the vessel to prosecute the voyage, although it may exceed what he would otherwise be liable for."

This doctrine was adopted by Mr. Chancellor *Walworth*, in the Court of Errors of New York, twenty years afterwards, in the case of *Dickey v. American Ins. Co.* 2 Wend., 658. with the more specific qualification, that the repairs must be made seasonably for the prosecution of the voyage.

The same doctrine was also adopted in Pennsylvania, in *Ritchie v. United Ins. Co.*, 5 Serg. & R., 501.

It does not appear whether it is contemplated, according to this doctrine, that underwriters on a part of a subject may make the experiment, or, if they do so, and succeed, whether they can compel reimbursement from the underwriters on the remainder, or from the assured for the uninsured proportion of the subject. See *infra*. *Commonwealth Ins. Co. v. Chase*, 20 Pick. R. 142.

The doctrine, that any offer by the underwriters to make repairs, or any acts of theirs in making repairs,

can defeat an abandonment or annul a right to make one, is strenuously opposed by Mr. Justice *Story*, in *Peele v. Merchants' Ins. Co.*, 3 Mason's R., 27. He says: "I know of no judgment where it has been held, that, in case of capture, or embargo, or blockade, the right to abandon can be intercepted by an offer to indemnify and pay all the expenses; if it could be, then an abandonment in all such cases would be perfectly nugatory, for the policy always imports, on the part of the underwriters, an agreement to this effect. And yet, if the principle be correct, I do not perceive why it is not as applicable to a case of capture as of sea-damage; to a case of blockade as of shipwreck. It appears to me to be introducing a new element of discord into the law of insurance, to allow the right of abandonment to be a shifting right, dependent on the will of both of the parties, and to be defeated by the act of one, after it has rightfully attached by the act of the other. And I am yet to learn how it is that an offer, made at the time of abandonment, to pay all expenses, can have more efficacy than the same offer incorporated as it is in the original terms of the policy. The assured may in all cases elect to repair at the expense of the underwriter."

Mr. Justice *Smith*, of Connecticut, commenting upon this doctrine says: "Where there is no express stipulation on the matter it contradicts the whole current of authorities to permit any subsequent transactions to remove the legal effect of abandonment rightly made at the time, except the agreement of the parties. Nor can I admit that the refusal of the underwriter to advance money, or undertake to defray the expense, will in any

case turn a Partial Loss into a Total Loss."

Mr. *Phillips* (vol. 2, p. 300) remarks, "the reasons of Mr. Justice Story are very cogent, and in conformity to the predominating jurisprudence, both direct and analogous, which seem to favor the doctrine that:—*Where there is no express stipulation on the matter any offer and readiness of the underwriter to be at all the expense of recovering or repairing the ship, and his actually repairing it and tendering it to the assured will not divest the assured of his right to recover for a Total Loss.*"

CONSTRUCTIVE TOTAL LOSS OF CARGO.

A total loss of the ship and an abandonment of her is not necessarily followed by a total loss of the cargo. The whole, or a principal part of the cargo may be saved and sent on to its port of destination; or it may be accepted by the merchant at the port of distress; in either of which cases the assured cannot abandon to the underwriters.

Goods are totally lost if destroyed by a peril insured against; or if injured to such an extent and in such way as to make them of little or no value for the purpose for which they were intended; or if the voyage upon which the insurance on the goods is made, be entirely broken up.

The underwriters undertake, that the cargo shall be capable of arriving at the port of destination, notwithstanding any of the perils insured against. It is, therefore, an insurance on the cargo for the voyage; and if,

by reason of the perils insured against, the cargo be permanently prevented from arriving at the port of destination, that constitutes a Total Loss, for which the insured is entitled to recover.

If the vessel during the voyage, be injured by the perils of the seas to the extent of half her value, and no other vessel can be procured to carry on the cargo to the port of destination; or, if the vessel, though repairable, cannot be repaired within a reasonable time, and before the cargo, being of a perishable value, will be irretrievably destroyed by the delay to repair, in such case, the assured is entitled to abandon and recover for a total loss. *Robinson v. Commonwealth Ins. Co.*, 3 Sumner, 224; *Patapsco Ins. Co. v. Southgate*, 5 Peters, 604; *Whitney v. New York Firemen's Ins. Co.*, 18 John, 208.

Where the loss, as being Partial or Total, depends on the *amount* of damage merely, the rule is the same in respect to the cargo, as in a policy on the ship; if the loss exceed half the value, the assured may abandon. *Gardner v. Smith*, 1 John Cas., 141; *Judah v. Randall*, 2 Caines Cas., 324; *Ludlow v. Col. Ins. Co.*, 1 John, 335; *Moses v. Col. Ins. Co.*, 6 John, 219; *Marcadier v. Chesapeake Ins Co.*, 8 Cranch., 39.

Where a constructive total loss is sought to be maintained, upon the mere ground of the deterioration of the cargo, at an intermediate port, all deterioration of memorandum articles must be excluded from the computation, where there are both memorandum and non-memorandum articles on board. In such a case, no abandonment for mere deterioration in value, could be

valid, unless the damage on the non-memorandum articles exceed a moiety of the whole of the goods insured, including the memorandum articles. *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch., 39, 48.

There can be no constructive total loss by damage to goods insured "free from Average." *Moreau v. U. S. Ins. Co.*, 1 Wheaton, 219; *Nelson v. Col. Ins. Co.*, 3 Caines, 108, 110; *Buchanan v. Ocean Ins. Co.*, 6 Cowen, 318, 331.

The terms used in a policy, "Total Loss," "free from Average," "free from Particular Average," "not liable for Partial Loss," and "Partial Loss excepted," mean one and the same thing; therefore, the statement made above, that where goods are insured "free from Average," the assured cannot abandon and recover for a Total Loss, applies with equal force to all these terms. This is the general rule, of both law and practice. There is one case, however, where it has been departed from in Massachusetts. In *Kettell v. Alliance Ins. Co.*, Sup. Jud. Ct., Mass., Nov. T., 1857, it was held, that if the subject insured be not perishable in its nature, the assured may abandon, if the damage exceed fifty per cent. of the valuation. Whatever weight this decision may have in that State, the weight of authority, generally, would not sanction an action under a policy restricted to a total loss, by any of the many phrases which are used for that purpose, unless the loss be total without abandonment. And cases have recently arisen in practice, where adjusters have endeavored to recover for a total loss, based on that decision, but were rejected unanimously by all the Boston underwriters,

The rule of fifty per cent. does not apply if any substantial part of the goods insured arrive in safety at its destined port. Thus, if, in the course of the voyage, the ship be stranded, and relieved by jettison of eighty per cent. of a shipment, and the remaining twenty per cent. arrive in safety, there can be no converting of this Partial Loss into a Total Loss by abandonment, whether the Contribution due would amount to more than thirty per cent., or less. Nor can a loss of part of the goods at the port of destination, be made a constructive total loss by abandonment, however large it may be. 2d *Parsons, Mar. Law*, p. 376. In *Forbes v. Manufacturers' Ins. Co.*, 1 Gray, 371, *Dewey, J.*, said: "The court are of opinion, that after any considerable portion of the goods insured, as in the present instance, thirty-eight per cent. of the whole amount of the number of boxes of teas, has arrived at the port of destination, and been landed in a perfect state, the assured cannot then abandon and recover for a Total Loss, upon the ground of the loss of more than fifty per cent., at some former period of the voyage." See also, *Seton v. Delaware Ins. Co.*, 2 Wash. C. C., 175.

An insurance against total loss, or with the exception of Particular Average, the two forms being equivalent, excludes a constructive total loss on account of damage to the article, so long as it remains *in specie*, and can be transported in the same ship, or another can be had to transport it, to the port of destination, so as there to be of value, as being the sort of article which it was at the time of being shipped. The object of these clauses

is to free the underwriters from the effects of the seawater and other damage. It is the intention to protect the merchant from the absolute loss of his shipment only, and they charge a lower premium accordingly. The underwriters, therefore, are liable (in case of injury to the cargo itself as the cause of loss) only in the event of a total physical loss of the cargo, the whole must be so damaged that it cannot reach its port of destination specifically as merchandise. They are not liable if any part of the cargo remain undamaged. General Average charges, however, the underwriters would have to pay, by virtue of the special effect of the warranty of the memorandum clause. *Maggrath v. Church*, 1 Caines, 196; *Depeyster v. Sun Mutual Ins. Co.*, 17 Barb., 306; *Neilson v. Col. Ins. Co.*, 3 Caines, 108; *Saltus v. Ocean Ins. Co.*, 14 Johns, 138; *Bryan v. New York Ins. Co.*, 25 Wend., 617; *Robinson v. Com. Ins. Co.*, 3 Sumner, 220; *Hugg v. Augusta Ins. & Banking Co.*, 7 Howard, 595.

CONSTRUCTIVE TOTAL LOSS ON FREIGHT.

An absolute total loss on ship and cargo, or, in some cases, on either, involves an absolute total loss on freight; in other words, where the circumstances of the case are such as to make the ultimate earning of freight wholly impossible, no notice of abandonment is requisite in order to make the assured on freight entitled to recover the whole sum he has insured on that interest. On the other hand, where the circumstances are such as to make the

ultimate earning of freight highly doubtful, without, however, destroying all hope of eventually earning it, then notice of abandonment may be necessary to entitle the assured on freight to recover as for a total loss on that interest; in a word, a constructive total loss of ship or goods is a constructive total loss on freight.

If a ship be rendered innavigable and cannot be repaired for the prosecution of the voyage, and another can be procured within a reasonable time and distance, and the master have means to procure such at an expense materially less than the amount of the original freight for the voyage, the underwriter on freight or profits, is not liable to be prejudiced by the master's neglect to tranship, any more than the underwriter upon the cargo, and the loss will be adjusted as if the cargo had been transhipped and forwarded; and will be partial or total according to the amount of the loss. *Jordan v. Warren Ins. Co.*, 1 Story's R., 342; 2d *Phillips*, 343.

If, notwithstanding the disaster to the ship, the master be ready to, and can, repair the damage so as to carry on the cargo within a reasonable time, to the port of destination, and so earn freight, he has a right to do so, unless the shipper will pay him full freight. In such case, therefore, there is not any loss of freight, total or partial. *Herbert v. Hallett*, 3 John's Cas., 93. *Lord v. Neptune Ins. Co.*, Sup. Jud. Ct., Mass., Nov. T. 1857; *Jordan v. Warren Ins. Co.*, 1 Story, 342; *Griswold v. New York Ins. Co.*, 1 Johns, 205.

If the ship, after sailing, put back in a damaged con-

dition to her original port of departure, the master is not obliged to part with the goods, except on payment of the full freight, if the goods were in such a condition that they could be taken on so as to arrive *in specie*. *M'Gaw v. Ocean Ins. Co.*, 23 Pick. 405; *Lord v. Neptune Ins. Co.*, Sup. Jud. Ct. Mass., Nov. T., 1857. *Griswold v. New York Ins. Co.*, 1 Johns, 205; *Ogden v. General Mutual Ins. Co.*, 2 Duer, 204.

The protraction of the voyage from any cause, gives no right of abandonment, if the ship finally arrive and earn her freight. *Everth v. Smith*, 2 M. & S., 278.

If the ship be injured, and a subsequent repair be necessary, which requires considerable delay, as the master has a right to retain the cargo for freight, if he deliver it up without payment of freight, this is his own fault, and not a loss by a peril for which the insurers are liable.

If the goods remain *in specie*, and be delivered to the consignee, freight may be demanded, and therefore is not lost, whatever be the degree of deterioration or the amount of damage; but they must remain what they originally were, and not be merely the products of decomposition, or fragments of a structure which no longer exists.

Where, in consequence of damage to the ship, the ship, cargo and freight are hypothecated for the expense of repairs to an amount exceeding the value of the ship and freight, this is a total loss of freight. 2d *Phillips*, 348.

If the freight be wholly lost, and the ship can earn

another for the same voyage, or for the remainder of the voyage, if a part have been performed, the new freight so earned is to be accounted for to the insurers on freight, as belonging to them by way of salvage. But if the ship do not pursue the same voyage, but go upon another, it has been held that the underwriters are not entitled to the freight earned on this substituted voyage. *Jordan v. Warren Ins. Co.*, 1 Story, 342; 2d *Phillips*, p. 350; 2d *Parsons*, p. 392.

A constructive total loss of cargo by capture, arrest or detention, is a constructive total loss of freight. *Simmonds v. Union Ins. Co.*, 1 Wash. 382, 443.

If the ship be insured in one place, and the freight in another, and the ship be abandoned, the insurers on the ship will take whatever subsequent freight the ship may earn. But the insurers on freight will take the freight previously earned; because every abandonment refers, in point of time, to the time of the loss which justifies the abandonment. In *Coolidge v. Gloucester Ins. Co.*, 15 Mass., 341, 346, Mr. Justice *Putnam* said: "Until that event happen the property remains in the assured; and the freight or earnings belong to him till that time, if he stand his own insurer for the freight, otherwise to the insurer on the freight. But after the loss has happened, the insurers, in virtue of the abandonment, become the owners, and are liable to the repairs and expenses, and entitled to the earnings of the ship." See also, *United Ins. Co. v. Lenox*, 1 Johns, Cas, 377; *Leavenworth v. Delafield*, 1 Caines, 573; *Simonds v. Union Ins. Co.* 1 Wash, C. C. 443. It is clear, therefore, that

as the underwriters on ship are entitled to the freight earned subsequent to the time of the loss, they must bear the expenses of earning it, *pro rata*;—that is to say, the wages &c. of the crew, are to be borne, *pro rata*, *after* the event, by the insurers of ship; and by the insurers of freight, *pro rata*, *before* the event for which the abandonment is made.

CHAPTER V.

BOTTOMRY.

When by any of the accidents of the navigation, disbursements are required to be made during the voyage, it is evident that each party concerned is obliged to procure the necessary funds at the time and place where they are wanted. The ship-owner is under no obligation to furnish at his expense and risk, money required on account of the cargo, nor can the owner of goods on board be obliged to provide the money required for the necessaries of the ship, or of other goods on board. It follows therefore, that when money is borrowed abroad for such purposes, by a person authorised to act on behalf of a party concerned, this is at the expense and risk of such party, who thereby becomes personally liable to the lender, and without reference to the future fate of the thing for which the money was laid out; and that a claim for Partial Loss, as well as a Contribution for General Average, may take place even after a subsequent total loss of the ship and cargo. We have, under the head of General Average, endeavored fully to explain, that, if money be advanced abroad by the ship-owner,

to meet expenses at a port of necessity (unless raised on Bottomry), such advance establishes a valid claim against the proprietors of goods at risk, and a personal action may be maintained against the said proprietors therefor. In other words: Expenses incurred for the common benefit, must be reimbursed in General Average, whether the ship and cargo be eventually saved or not. *Spafford v. Dodge*, 14 Mass. 66.

The means by which the master of a vessel may raise the money requisite abroad for the purposes of the voyage are, generally speaking, a loan under the responsibility of the owners (by drawing bills upon them), a bottomry loan, and the sale of a part of the cargo. Among these, he may, as far as the circumstances of the case admit, select that which he thinks the most eligible. When a ship is under Average, in a port in the same country where she is owned, the expenses are usually paid by the master drawing a bill on the owner. Should the sum required be too large for the owner to meet, he sometimes procures a portion from the proprietor of the cargo, or, if he be insured, an advance from his underwriters. Arrangements relating to funds are naturally more easy to make when the owners reside in the same country in which the Average occurs, and where there are means of communication between the master and his owner. Even in foreign countries, it frequently happens that a ship-owner has sufficient credit for the agent or merchant disbursing average expenses on his vessel, to be satisfied with a bill of exchange upon him without further security. It is exceedingly advantageous thus to be able to raise funds, and save considerable ex-

pense. But in a majority of cases, the agent who advances the money for a vessel under Average in a foreign country, requires a greater security for his outlay of funds than a simple bill of exchange. When money cannot be raised in this manner, the master should take an early opportunity of ascertaining the fact, communicating full particulars, with estimates of the probable expense to his owners; and with the present facilities of steam, if his vessel be in an European port, he will probably be able to transmit intelligence and receive a reply by the time his vessel is again ready for sea. By the reticulation of the electric telegraph, the master is able to communicate from almost all places in the United States and Europe with his owners, but as messages by the Atlantic Cable, are at present exceedingly expensive, this mode of communicating with the owners should not be resorted to unless the case be so urgent, that intelligence by other means would be injurious to the interests concerned. Where, however, the port to which the vessel may be driven for repairs, will not admit of the master's consulting with his owners, it is usual to pay the disbursements by a Bottomry Bond, but as this is an expensive means of raising money, the master should endeavor to reduce the amount to be borrowed as much as possible; to do this he should apply the sale of any condemned stores of the ship, and the proceeds of any damaged goods, part of the cargo, which surveyors have recommended to be sold on the spot, in diminution of the amount of disbursements.

Although an owner may make a bottomry bond any where, and for any reason, the master can do so abroad

only, and from necessity ; his power in this respect being exactly analogous to his power to sell, excepting that he may be justified in giving a bottomry bond by a less necessity than is required to authorise his sale of the ship. And the power belongs to any one who is lawfully master of the ship however appointed. *The Gratitude*, 3 Rob. Adm., 240, 266; *The Nelson*, 1 Hagg. Adm., 169; *The Orelia*, 3 Hagg. Adm., 1.

It is frequently said, that a master in a port of this country, may bottom his ship if her home port be in another state. *Selden v. Hendrickson*, 1 Brock. C. C., 396. The vessel in this case belonged to Richmond, Virginia, and the bond was given in New York. But this ruling cannot be sustained ; for the master does not have the power of thus binding the ship to the payment of maritime interest, if the owner can be consulted, whether he be in the same, or in a neighboring country. If the master be in the British provinces, and the owner in the state of Maine, within a day's sail or ride of him, the master can have no such power. It must be a foreign port in the sense of a distant port ; this is sufficient ; and it may therefore be the port of destination. *Reade v. Comm. Ins. Co.*, 3 Johns. 352. 1 *Parsons' Mar. Law*, p. 414.

In a case of necessity, where it is impossible to communicate with the owners, the master may give a bond, although the owners reside in the same country. *La Ysabel*, 1 Dods, 273.

The master, for the same reason, has no such power if he have funds of the owner within his reach ; or if he can borrow the money on the personal credit of the

owner ; or if a consignee be there with funds of the owner, or any agent of the owner ; or, it is said, if the master have funds of his own. *The ship Packet*, 3 Mason, 255, 263.

The essential pre-requisites to the validity of a bottomry bond given by the master are, 1st, That it be given in the absence of the ship owner, and at such a distance from his residence, and under such circumstances as that he cannot be consulted in regard to it without injurious delay. *La Ysabel*, 1 Dod, 273 ; *The Trident*, 1 W. Rob., 29 ; *Patten & Dickson v. The Randolph*, Gilpin, 457. 2d, That the money, repairs or supplies for which the bond is given be necessary—meaning thereby, reasonably fit and proper under the actual circumstances, or, at least, shall appear to the lender upon due enquiry to be necessary—to enable the ship to complete the voyage. *The Fortitude*, 3 Sumner's Rep., 228 ; *The Prince of Saxe Coburg*, 3 Moore, P. C. R., 1 ; *Gratitudine*, 3 C. Rob., 240 ; *The Aurora*, 1 Wheat, 96. 3d, That the money, repairs or supplies for which the bond is given, be advanced, or be made or furnished, on the credit of the ship, and that it do not appear to the lender, on due and reasonable enquiry, that the money or repairs or supplies can be had on personal credit. *Heathorn v. Darling*, 1 Moore, P. C. R. 5 ; *The Saxe Coburg*, 3 Moore, P. C. R. 1. *The Randolph*, Gilpin, 457. If the advances or repairs were necessary, it belongs to the owner to show that they could be procured on personal credit. *The Virgin*, 8 Peters, 538. 4th, That the principal and interest put by the bond at the risk of the voyage, *i. e.*,

that the payment of the money shall be made by the bond to depend upon the safe arrival of the ship at the end of the voyage upon which the money is loaned. *The Emancipation*, 1 W. Rob., 125; *The Atlas*, 2 Hagg. 65; *Stainbank v. Shepard*, 20 Eng. L. & Eq., 547.

A bottomry bond given by the master after the advances had all been made, is valid, provided that they were made with an understanding that such a bond would be given. *The Virgin*, 8 Peters, 538. But if the advance were originally made on personal credit, the bond is invalid. *The Trident*, 1 W. Rob., 34; *The Augusta*, 1 Dod, 283; *The Hunter*, Ware, 249.

In a suit on a bottomry bond given by the master, the libellant must prove by evidence, other than the bond itself, that the money was lent, or the repairs made, and material furnished, to the amount claimed; and that they were necessary to enable the vessel to perform the voyage or for her safety. He must also exhibit an account of the items advanced, with sufficient proof to support them, to enable the court to judge of their necessity. *The brig Bridgewater*, 1 Olcott, R., 35.

Bills of exchange may be drawn on account of the supply, and a bottomry bond given at the same time as a collateral security, in this sense, that if the bills of exchange be honored, (that is, accepted and paid, if they require acceptance, or paid if they do not, as the case may be), the bottomry bond is discharged, and though the ship arrive, the maritime interest is not payable; if dishonored, the amount is payable on arrival, by means of the remedy against the ship, and in that case with

maritime interest. *Stainbank v. Shepard*, 20 Eng. L. & Eq. 547; *The St. Catherine*, 3 Hagg. 250; *The Atlas*, 3 Hagg. 43; *The Emancipation*, 1 W. Rob., 124; *The Hunter*, Ware, 249.

The borrower on a bottomry bond is discharged of the payment only in the case of an actual loss occasioned by the perils the lender assumes; and the insurer on a bottomry interest is liable only in the case of an actual loss occasioned by the same perils. *Joyce v. Williamson*, 3 Doug., 164; *Thompson v. The Royal Ex. Ass. Co.*, 1 Maule & Selwin, 30; *Pope v. Nickerson*, 3 Story, 465. In case of a deviation from the voyage or a voluntary abandonment of it, after it had been commenced, the bond becomes absolute and payable. *The Dante*, 2 W. Rob., 427; *Pope v. Nickerson*, 3 Story, 465.

A bottomry bond is sometimes taken for a larger amount, but that furnishes no ground of objection to the bond, except for the surplus; for a bottomry bond may be good in part and bad in part, and it will be upheld by courts of admiralty as a lien to the extent to which it is valid; as such courts, in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity. There are many authorities to this effect, but it is necessary to mention only, *The Virgin*, 8 Peters, U. S. S. C. Reps. 208; *The Augusta*, 1 Dodson, 283; *The Tartar* and *The Nelson*, 1 Hag. Adm. R. 169, 176.

A bottomry bond does not make the owners personally debtors. *The Nelson*, 1 Hag. Adm. R. 176. *The Virgin*, 8 Peters, 208.

A bottomry bond which hypothecates the ship, does

not, of necessity, hypothecate the freight also. But the master has the same power over the freight that he has over the ship, and may hypothecate the freight under the same circumstances, for the same reasons, in the same way, and by the same bond. And a general hypothecation of the freight by the master in a foreign port, will be construed to include all the freight of the whole voyage, whether earned at the time the bond is made or not, provided it have not been paid to the master or owner. *The Gratitude*, 3 Rob. Adm., 240, 274; *The Nelson*, 1 Hagg. Adm., 169; *The schooner Zephyr*, 3 Mason, 341; *The John*, 3 W. Rob., 170.

A bottomry bond is preferred to any other lien whatever, excepting only the lien of the seamen for wages, and the lien of material men for repairs or supplies indispensable to her safety. The reason of this rule is, that a bottomry bond saves the ship; for it is to be presumed that it was made from a strict necessity; and if it had not been made, the other liens on it would have been worthless. The reason of the exception is, that the bottomry bond itself would never have brought the ship within reach of any person having an interest or a lien upon her, had she not been navigated home by the seamen. *The Mary*, 1 Paine, C. C., 571; *Blaine v. Ship Charles Carter*, 4 Cranch, 328; *The Virgin*, 8 Peters, 538. For the reason that a bottomry bond is supposed to have saved the ship, it is construed very liberally by all courts, and if possible the intention of the parties is carried into effect. *Pope v. Nickerson*, 3 Story, 365.

A bottomry bond is generally regarded as a negotiable instrument or interest, which being transferred in good

faith and for consideration, may be put in force by the holder in his own name.

Admiralty courts are especially disposed to apply, to all questions which come before them on contracts of bottomry, principles and considerations of equity. Thus, although there be no precise limit to what is called maritime interest, and in some cases a very large per centage be allowed, yet if it be apparent and certain that the lender took advantage of the borrower's necessities to make him pay for the money far more than it was worth, a court of admiralty will interfere and reduce the interest within proper bounds. *La Ysabel*, 1 Dods, 273; *The Zodiac*, 1 Hagg. Adm., 320, 326; *The Cognac*, 2 Hagg. Adm., 377; *The Hunter*, Ware, 249; *The Ship Packet*, 3 Mason, 255, 260.

As a master may make a bottomry of the ship, so either a part, or the whole of the cargo may be hypothecated by him if necessary. If the goods be hypothecated by the master abroad, this is usually done by a respondentia bond. And the rules in reference to this necessity are the same as in the case of bottomry. A loan on respondentia is a loan on maritime interest; it must therefore be a loan which is secured by the goods on their safe arrival, but which puts both principal and interest at risk, and gives the lender no claim for any payment whatever if the goods be lost. In practice the goods are also transferred to the obligee by an indorsement and delivery of the bills of lading as collateral security and this gives to the obligee a constructive possession of the goods. 1 *Parsons*, 437.

There is no settled form of contract in use on these

occasions. Sometimes an instrument in the form of a bond, at others, in the form of a bill of sale, at others, of a different shape, is made use of. But whatever the form, the occasion of borrowing, the sum, the premium, the ship, the voyage, the risks to be borne by the lender, and the subjection of the ship itself as security for the payment, all usually are, and properly ought to be, expressed. It is absolutely necessary that the liability of the lender to the sea-risks should appear, or be fairly collected from the instrument, otherwise the reservation of maritime interest will render the security void, on the ground of usury, not only as a charge upon the ship, but also against the person of the borrower.

When two or more bonds are given on the same voyage, the last takes precedence, and so on in retrograde order. The last one being satisfied, the penultimate takes what is left, &c. There is one exception however. If after a bond has been given, the captain obtain a credit from his owner, and then give a subsequent bond, the first in this case takes priority.

It has been doubted whether a bottomry bond may be given to a consignee of the ship, or to any party holding, to the ship owner, the relation of agent to principal. But it has been decided by authority, that such a bond is valid. If the consignee however, have funds in his hands belonging or due to the owners of the vessel, it is well settled that he cannot lend his own money on bottomry. *Hurry v. The Ship John & Alice*, 1 Wash. C. C., 293; *The Ship Lavinia v. Barclay*, 1 Wash. C. C., 49; *Ross v. The Ship Active*, 2 Wash. C. C., 226; *Pease v. Commercial Ins. Co.*, 2 Johns, 352.

FORM OF BOTTOMRY BOND.

Know all men, by these presents, that I, A. B., master of the ship “Enterprise,” of Liverpool, in the Kingdom of Great Britain, now lying at anchor in the port of Boston, in the Commonwealth of Massachusetts, in the United States of America—for myself and C. D. of Liverpool aforesaid, merchant, and owner of the said ship “Enterprise,” am held and firmly bound unto E. F., of Boston aforesaid, merchant, in the penal sum of twenty thousand dollars, for the payment of which, well and truly to be made unto the said E. F., his heirs, executors, administrators or assigns, I hereby bind myself, my heirs, executors and administrators, firmly by these presents. In witness whereof, I have hereunto set my hand and seal, in the city of Boston aforesaid, this —— day of —— in the year 18—. WHEREAS, the above bound A. B. hath taken up and received of the said E. F. the full and just sum of ten thousand dollars upon the bottomry of the said ship “Enterprise,” whereof the said A. B. is now master, at the rate of twenty per centum (20 per cent.) for the voyage from the port of Boston as aforesaid, to the said port of Liverpool, for the purpose of enabling him the said A. B. to procure the necessary repairs for the said ship to fit her for sea, she having put into the said port of Boston in distress, and he, the said A. B., being destitute of the other means to obtain them; the said ship having permission to touch, stay at, and proceed to, all ports and places within the limits of the voyage. In consideration whereof, the usual risks of the seas, rivers, enemies, fires, pirates &c. are to be on ac-

count of the said E. F., the said A. B. doth, by these presents, mortgage and assign over to the said E. F., his heirs, executors, administrators and assigns, the said ship "Enterprise," her boats, tackle, apparel and furniture. And it is hereby declared, that the said ship "Enterprise" is thus assigned over for the security of the afore-said money so advanced to the said A. B., and shall be delivered to no other use or purpose whatever, until payment of this bond be first made, with the premium due thereon.

Now, the condition of this obligation is such, that if the above bound A. B., his heirs, executors or administrators, shall and do, well and truly pay, or cause to be paid, unto the said E. F., or to his attorney in Liverpool, legally authorised to receive the same, his executors, administrators or assigns, the full and just sum of ten thousand dollars, being the principal of this bond, together with the premium which shall become due thereon, at or before the expiration of ten days after the safe arrival of the said ship "Enterprise" at her moorings in the river Mersey, or, in case of the loss of the said ship "Enterprise," such an Average as by custom shall have become due on the salvage, then this obligation to be void and of no effect, otherwise to remain in full force and virtue. Having signed to three bonds of the same tenor and date, the one of which being accomplished, the other two to be void and of no effect.

Signed, sealed and delivered A. B. [L. s.]
in the presence of
G. H.
I. K.

CHAPTER VI.

SALVAGE.

Salvage is a compensation for maritime services, rendered in saving property or rescuing it from impending peril, on the sea, or wrecked on the coast of the sea, or on a public navigable river or lake, where inter-state or foreign commerce is carried on. "I take it to be very clear," says Mr. Justice *Story*, "that wherever the service has been rendered in saving property at sea, or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a Salvage service." *The Sch'r. Emulous*, 1 Sumner, 210; *The Clifton, Lightbody*, 3 Hagg. Ad., 117; *Fretz v. Bull*, 12 Howard, 466.

The amount of compensation for a Salvage service, according to the maritime law of the United States and England, rests, in the sound discretion of the court, upon a full consideration of all the facts of the case. The reasonableness of the compensation must, in the nature of the case, depend upon a full and fair consideration of all the circumstances of time, place, labor, danger, value and number of salvors who performed, or were necessary to perform, the Salvage service.

Persons engaged in the business of wrecking, are very apt to acquire a habit of thinking that they are entitled,

of *right*, to a *reward* for saving property, to something more than common pay for common labor. And when that reward is withheld from them, or is not so large as they think it ought to be, they think great injustice is done them. Whereas the truth of the matter is, according to all the leading cases on the law of Salvage in the United States and England, salvors are entitled, of *right*, to a reasonable compensation for work and labor *only*; and no injustice is done them when they are paid this, and the reward is withheld. The reward—or the excess beyond pay for work and labor—is not awarded to them on their own account at all, but purely on account of commerce in general, to encourage others to save property in the like peril. If persons would as readily and voluntarily save property at sea, as they do on the shore from a burning house, no salvage would be decreed by the courts in the one case, any more than in the other. *The Blaican*, 2 Crouch, 240; *The Sarah*, 1 C. Rob., 312; *The Hector*, 3 Hagg. 95. From this view of the subject, it follows, that salvages ought never to be graduated at higher rates than the good of commerce really requires; and whenever it appears that more vessels and men are employed in the business of saving property, than the good of commerce truly requires, it is evident that the rates of salvage have been too high—too stimulating. Commerce may be damnified by too high salvages, not only by being subjected to their payment, but also by increasing the inducement to salvors to collude with shipmasters with a view to the acquisition of such salvages.

The ingredients of a salvage service are, first, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress; risking their own lives to save their fellow-creatures, and the property of others; secondly, the degree of danger and distress from which the property is rescued—whether it were in imminent peril, and almost certainly lost if not at the time rescued and preserved; thirdly, the degree of labor and skill which the salvors incur and display, and the time occupied; lastly, the value. Where all these circumstances concur, a large and liberal reward ought to be given; but where none, or scarcely any take place, the compensation can hardly be denominated a salvage compensation; it is little more than a mere remuneration *pro opere et labore*. The *Hector*, Freeman, 3 Hagg. Adm., 90; The *Industry*, Davies, 3 Hagg. Ad., 203; *The Clifton*, 3 Hagg. 121; *Tyson v. Prior*, 1 Gall., 133.

The kind and degree of peril to which the property was exposed, are important considerations in determining questions of salvage. No salvage can be earned, unless the peril were real; not speculative, merely. But it need not be such, that escape from it by any other means than by the aid of salvors was impossible. It is sufficient to entitle to salvage, that the peril was something extraordinary—something differing, in kind and degree, from the ordinary perils of navigation.

In the case of the *Emulous*, 1 Sumner's R., 216, Mr. Justice *Story*, in estimating the degree of peril from which the property was rescued, in order to fix the amount of compensation, said; "Salvage is a compen-

sation for the rescue of the property from present, pressing, impending perils, and not for the rescue of it from possible future perils. It is a compensation for labor and services, for activity and enterprise, for courage and gallantry actually exerted, and not for the possible exercise of them, which, under other circumstances, might have been requisite. It is allowed, because the property is saved; not because it might have been otherwise lost upon future contingencies. Subsequent perils and storms may enter as an ingredient into the case, when they were foreseen, to show the promptitude of the assistance, and the activity and sound judgment with which the business was conducted; but they can scarcely avail for any other purpose. Ought the Salvage to be diminished by a favorable state of the weather after the arrival in port? If not, why should it be increased by an unfavorable state of the weather? To introduce such ingredients into the estimate of Salvage, which were neither foreseen nor acted upon, would compel the court to deliver itself over to conjectures, resting on loose probabilities, the nature and extent of which could never be measured. It would be to go off soundings; to desert facts; and to be guided by speculations, always questionable, and sometimes deceptive."

Where a stranded vessel is saved from imminent peril, the Salvage ought to be greater, other things being equal, than where the vessel is lost, and the cargo only, saved; and *vice versa*. If the vessel and cargo be saved in a comparatively undamaged condition, by the skill and activity of salvors, the reward ought to be

increased in proportion, in some degree, to the superior benefits conferred, and to the skill and activity of the salvors; and *vice versa*. And if saved by carrying out anchors, or by the skilful use of the sails, or by piloting, the reward may be fully equal to what the number of salvors necessary to that service would probably have received, had the vessel been lost and the cargo, only saved. *Marvin's Wreck and Salvage*, p. 121.

The value of the property saved is often an important ingredient in determining the amount of Salvage. The remuneration to the salvor and benefit to the owner are always larger, where the property that receives assistance is large, than where it is small; and *vice versa*. *Ibid*, 122.

It is competent for the parties interested to agree upon a stipulated sum, as a Salvage reward, for the rendition of Salvage services, to be paid only in the event that such services save, or contribute to save, the property. But such agreement will not be binding upon the master, or owner of the property, unless the court can clearly see that no advantage has been taken of the party's situation, and that the rate of compensation agreed upon is just and reasonable. *The Schooner Emulous*, 1 Sumner, 207.

The master or owners of a ship have no right to make an agreement for Salvage assistance to the ship irrespective of the cargo. Such an agreement would be an encouragement to fraudulent bargains by owners and masters of vessels, to the detriment of owners of the cargo; and, of course, salvors would make a bargain

much more advantageous to the owners of the ship, with the master, when they are sure of obtaining his assistance to get a larger Salvage from the owners of the cargo. *The Westminster*, 1 W. Rob., 235. In assessing the Salvage upon the ship and cargo, the usual rule of the court is to take the whole value of the ship and cargo, and assess the amount of remuneration upon the whole, each paying its due proportion. *Marvin*, p. 130.

The goods of the United States are liable to the same rate of Salvage as those of individuals, and may be arrested and proceeded against in like manner. *United States v. Wilder*, 3 Sumner, 308.

If a vessel at sea be short-handed, by reason of sickness, and be navigated into port by part of the crew of another vessel, this is to be treated as a Salvage service. *Williamson v. Brig Alphonso*, 1 Curtis C. C., 376.

If the vessel be fraudulently imperilled by the master, this does not defeat the claim of the salvors, unless they were parties to the fraud, or were cognizant of it while it was going on, and did not interfere to prevent it as far as they could, or endeavored to conceal the master's misconduct and screen him from detection. *Brevoor v. The Fair American*, 1 Pet. Adm., 87, 95.

Compensation has been granted for keeping near a vessel in distress, at the earnest request of her master and crew, although but little aid were rendered. *Allen v. Ship Canada*, Bee., 90.

If a vessel be stranded near her port of destination, and it become necessary to tranship the cargo, this is a salvage service. *The Westminster*, 1 W. Rob., 229.

As a general rule, when two vessels come into collision, they are bound to render assistance to each other, if necessary; and one aiding the other cannot generally claim salvage, although the one assisted were the cause of the accident. *The Sappho*, 1 Swabey, Adm., 242.

A vessel is a *derelict*, in the sense of the maritime law, when she is found at sea deserted, and has been abandoned by the master and crew, without the hope or intention of returning and resuming possession of her. In like manner, goods abandoned at sea by the master and crew, without the hope or intention of returning and resuming the possession of them, as in case of jettison, are derelicts. But where the master and crew leave the vessel or goods temporarily, without any intention of a final abandonment, but with the intent to return and resume the possession, such vessel or goods are not considered as legal derelicts; nor is the right of possession lost by such temporary absence, although no individual may be remaining on board the vessel or near the goods, for the purpose of retaining the possession. *The Bee*, Ware, 339; *The Aguila*, 1 C. Rob., 41; *Rowe v. Brig*, 1 Mason, 373; *The Elizabeth & Jane*, Ware, 35; *The John Perkins*, U. S. C. C. Mass., 21 Law Reporter, 87, 94; *The Emulous*, 1 Sum. 207.

The finder of a derelict who takes actual possession of it, with an intention of saving it, gains a right of possession which he can maintain against all persons, even the true owner. He does not acquire the dominion or absolute property. This remains in the owner; for it is presumed that the owner has not thrown away his pro-

perty purposely, but has abandoned the possession merely through necessity. Nor has the master of a vessel authority to give or throw away the owner's goods, so as to divest him of his right of property, however great the peril or distress may be. But the finder, taking the possession left vacant, acquires the right of possession, and becomes bound to preserve the property with good faith and to bring it to a place of safety for the owner's use; and he acquires a right to be paid for his services a reasonable and proper compensation out of the property itself. He is not bound to part with the possession until this be paid, or the property be taken into the custody of the law preparatory to the amount of Salvage being legally ascertained. Should the salvors meet with the master or owner, and he should tender his assistance in saving and securing the property, this ought not without good reason, to be refused, as this would be no bar to the right of Salvage, and should it be unreasonably rejected, it might materially affect the opinion of the court as to the amount proper to be allowed, *Marvin, Wreck & Salvage*, p. 137; *The Bee*, Ware, 339; *The Amethyst*, Davies, 20.

Persons who have taken the actual possession of a derelict with the means and for the purpose of saving it, do not lose their right of possession by temporarily leaving it with an intention of returning and resuming the actual possession. But their absence must be with an intention of returning, and strictly temporary, and for a justifiable cause, otherwise they will lose their right of prior possession. *The India*, 1 W. Rob, 406; *The Amethyst*, Davies, R. 20; *The schooner John Wurts*, Olcott, R. 462.

Persons engaged in the enterprise of saving a derelict are bound in good faith to act for the interests of the owner, as well as their own. Generally the interests of salvors and owners will be the same; that of conveying the goods to a place of safety without loss and expense; but if it were otherwise, it would be a violation of good faith for the salvors to look solely to the enhancing of their reward at the expense of the owners. The golden rule of dealing with others as we would have others deal with us, is a principle of social duty deeply laid in morals and in the constitution of human nature; and in these cases of providential calamity, it is a rule of law as well as of morals. If they cannot, with their own force, convey the property to a place of safety without imminent risk of a total or material loss, they cannot, consistently with their obligations to the owner, refuse the assistance of other persons proffering their aid, nor exclude them from rendering it, under the pretext that they are the first finders, and had thus gained a right to the exclusive possession. *The Amethyst*, Davies, R., 20. Nor can third persons lawfully intrude themselves upon their possession nor divest them of it, nor gain the right to be considered co-salvors, without their consent, except under such circumstances of urgent necessity as would make it the duty of the original salvors to accept their assistance. The services of persons unjustifiably intruding themselves enure to the benefit of the original salvors. *The Blenden Hall*, 1 Dod., 414; *The Eugene*, 3 Hagg. 156; *The Mary*, 2 Wheaton, 123. And although it may be the duty of salvors who have fallen into circumstances of distress and peril themselves, to

accept the proffered assistance of others, who may thereby become co-salvors, yet such second salvors have no right to make it a condition of rendering their services, that the first shall abandon the enterprise, or give up their right to be considered as salvors ; and any agreement to that effect would be decreed, by the court, a fraudulent advantage taken of their necessities, and utterly void. In such cases of joint service, the first salvors are to be considered as the principals, and the second as auxiliaries, and the Salvage will be divided among them according to their respective merits, *Marvin's Wreck & Salvage*, p. 141 ; *The Ewbank*, 1 Sumner, 400 ; *The Eugene*, 3 Hagg. 156.

Where the first set of salvors is inefficient, or incompetent to perform the service, or they do not possess the necessary facilities, of which the master or owner on the spot must, of necessity, in the first instance, be the judge, they may be lawfully discharged, and will be paid by the court for the services they have rendered ; and a second set may be rightfully employed. *The Glasgow Packet*, 2 W. Rob, 307 ; *The Dantzic Packet*, 3 Hagg. 383.

Embezzlement by salvors, however small in amount, whether at sea or in port, or after the goods are in the custody of the law, produces a forfeiture of all Salvage. In the *John Perkins*, 19 Law Reporter, 490, *Ware, J.* said : " Salvors are bound not only to scrupulous honesty themselves, but while the property is in their custody, they are jointly required to employ every reasonable degree of diligence to prevent it from plunderage

by others. Any negligence in this respect, if not visited with an entire forfeiture of Salvage, will be remembered in fixing the amount.

The law exacts good faith on the part of salvors. Fraud committed against the master, owners or underwriters, or collusion with the master to defraud the owners or underwriters, will work a forfeiture of Salvage.

Gross negligence or carelessness in rendering the service or in the subsequent preservation of the property, being a species of fraud, works a forfeiture of Salvage. Where the salvors had got the ship off from one shoal and were proceeding with her to a place of safety, but got her upon another, through gross negligence in their not attending to the course of the ship, it was held, that the entire Salvage should be forfeited, notwithstanding there was a licensed pilot on board directing her course. It was held, that the salvor could not exonerate himself from responsibility for his own inattention to the course of the vessel, by shielding himself behind the pilot. *The Duke of Manchester*, 2 W. Rob., 470 on appeal in 6 Moore, P. C. Rep., 90; *The Neptune*, 1 W. Rob., 298.

Good faith and fairness are required of salvors in the manner of settling the Salvage. Where a person who had an interest to enhance the amount of the Salvage, which was known to the salvors, acted as the master's consignee and adviser, and the Salvage was settled by arbitration, notwithstanding there was an admiralty court within a convenient distance that might have been resorted to without injurious delay, and the sum

awarded was larger than was just, the Supreme Court of the United States held, that the circumstances afforded evidence of an attempt, by imposition upon the master or by collusion with him, to obtain a larger Salvage than was just, and that such an attempt worked a forfeiture of all Salvage. *Houseman v. The N. Carolina*, 15 Peters, S. C. R., 40.

As to the *distribution of Salvage*—where the salvors are few, or the Salvage small, the court, oftentimes, in pronouncing its decree for Salvage, awards a specific sum to each salvor. But where the salvors are numerous, or a considerable proportion of the value is allowed for Salvage, the usual practice of the court, is, first to determine the whole amount, and afterwards to distribute it among the salvors, according to their respective merits. The apportionment, like the amount, depends upon the discretion of the court, guided more or less, by a few general rules. *Marvin's Wreck & Salvage*, §229.

In apportioning the Salvage among the officers and seamen, the master's share is usually, at least, double the amount of the mate, on account of his superior responsibility, although the latter may have been put in charge of the wreck; and the mate is usually allowed at least double the share of an ordinary seaman. The seamen who navigate the derelict into port, have usually a larger sum, frequently double the amount allowed those that remain on board their own vessels. *The Ewbank*, 1 Sumner, 429; *The La Belle Creole*, 1 Peters' Ad., Dec. 45; *The Cato*, *ibid*, 69; *The Caroline*, 2 W. Rob., 124. But these proportions are often varied according to circumstances, so as to reward superior zeal,

energy and gallantry, and to discourage indifference and selfishness.

The owner of cargo on board the salvor ship, is not entitled to share in the Salvage on the ground of the exposure of his property to peril, nor on the ground of the loss of insurance by the deviation, unless he have expressly assented thereto, and thereby released the ship-owner from his responsibility. *The Nathaniel Hooper*, 3 Sumner, 577; *The brig Cora*, 2 Peters, Ad. Dec. 361; *The Blaireau*, 2 Cranch, 240.

The case of *The Blaireau*, 2 Cranch, 240, is a leading case on the subject of apportionments. It was a case of a derelict which had been navigated some two thousand miles by the salvor crew, put on board from the ship *Firm*. The court allowed the owners of the *Firm* one-third; the residue was divided among the salvors so as to give fifty per cent. more to the persons who navigated the wreck than to those who remained on board their own vessel, on account of the greater danger encountered by the former. The share of the master was forfeited on account of embezzlement, and the share of the mate was reduced to that of a common seaman on account of his neglect in taking care of the property. Two apprentices and a slave were allowed half as much as the common seamen—the shares of the apprentices being paid to themselves, and the share of the slave to his master. The cases of *The Henry Ewbank*, (1 Sumner, 400) and *Nathaniel Hooper*, 3 Sumner, 577, are leading cases.

The officers and crew of our national vessels are so far bound to rescue a vessel from mutineers, that they are

not entitled to claim Salvage for such a service, unless perhaps where they incur great personal danger and use great exertions in the performance of the service. *The Francis and Eliza*, 2 Dods, 115; *United States v. The Amistad*, 15 Peters, 518. But for an ordinary Salvage service they are clearly entitled to compensation. But as their time and the property which they subject to risk belong to the government, their compensation is less than it would otherwise be; and the government is allowed for the pay, victualing, and wear and tear of the ship, while employed in the Salvage service. *The Clifton*, 3 Hagg. Adm., 117; *The Rapid*, 3 Hagg. 419; *The Thetis*, 3 Hagg. Adm., 14.

Under ordinary circumstances, the owners of the saving ship have one-third of the amount decreed, and may have more if the Salvage service expose their ship to peculiar danger. *The Henry Ewbank*, 1 Sumner, 400; *The schr. Boston*, 1 Sumner, 328. In the following cases one half of the amount decreed has been allowed the owners—*The Columbia*, 3 Hagg. Adm., 428; *The Martha*, 3 Hagg. 434; *The Waterloo*, 2 Dodds, 433; *The Rising Sun*, Ware, 378, 385; *Taylor v. ship Cato*, 1 Pet. Adm. 48, 68. In *The Nicolina*, 2 W. Rob, 175, one-fifth was allowed. In *The Hope*, 3 Hagg. Adm., 423, about two-fifths; and in *Smith v. The Stewart*, Crabbe, 218, one-thirteenth.

In cases of Salvage, the salvors themselves are admitted as witnesses in their own behalf, from necessity, as they are often the only persons who have any knowledge of the circumstances. *The Elizabeth & Jane*, Ware, 35. But this necessity, from which their competency arises,

limits that competency, and they are not admissible as witnesses for themselves, or for each other, to entirely independent facts which can be proved by other testimony. *The Boston*, 1 Sumner, 328; *The Henry Ewbank*, 1 Sumner, 400.

CHAPTER VII.

COLLISION.

There are four possibilities under which an accident of this sort may occur :

1st—It may happen without blame being imputable to either party ; as where the loss is occasioned by a storm or any other *vis major*. In that case, the misfortune must be borne by the party on whom it happens to light ; the other not being responsible to him in any degree *Stainback v. Rae*, 14 Howard's R., 532.

2d—A misfortune of this kind may arise, where both parties are to blame ; where there has been a want of due diligence or of skill on both sides. In such case, the rule of law is, that the loss may be apportioned between them, as having been occasioned by the fault of both of them. *Schooner Catherine v. Dickinson*, 17 Howard R., 170.

3d—It may happen by the misconduct of the suffering party, and then the rule is that the sufferer must bear his own burden.

4th—It may have been the fault of the ship which ran the other down ; and in this case, the injured party would be entitled to an entire compensation from the other.

There are certain nautical rules by which in most cases, the question of negligence is decided. Thus, if a vessel be going close-hauled to the wind, and another meeting her be going free, the rule of the sea is, for the latter vessel to go to the leeward; and although such vessel may go either to the leeward or windward, as she best can, yet she ought, as a general rule, to suppose that the vessel going to the windward will keep her position. If two vessels be beating to windward on opposite tacks, it is the duty of the vessel on the starboard tack to continue her course, and that on the larboard to give way; and when both vessels have the wind large or abeam, and meet, they should pass each other on the larboard hand, to effect which the helm must be put to port.

If a vessel have, by no voluntary action on her part, contributed to the Collision, as where she is thrown against another vessel by the swell caused by a passing steamer, she is not liable. *Kissam v. The Albert*, U. S. D. C., N. Y., April, 1858. 21 Law Reporter, 41. So, where one vessel runs into another and causes it to come into Collision with a third vessel, the second is not liable to the third if damage ensue, if it were not otherwise to blame. *The Moxey*, Abbot, Adm., 73.

If the cargo be injured by Collision through any fault of the master, the shipper has an undoubted claim. If the Collision occurred from the irresistible force of tide or storm, the ship is excused, because the loss was occasioned by a peril of the sea. *Butler v. Fisher*, 3 Esp., 67. But if the Collision occurred wholly through the fault of another vessel and most unnecessarily, but with-

out any fault on the part of the ship which contains the damaged cargo, then the ship is not excused, whether there be a bill of lading or not, such Collision being neither an act of God, or "a peril of the sea." *Marsh v. Blythe*, 1 McCord, 360. And if neither party be to blame, the defendant is liable if no bill of lading be given, because such Collision would be neither an act of God nor of the public enemy. In *Plaisted v. Boston & Kennebec Steam Nav. Co.*, 27 Maine, 132, no bill of lading was given. The goods were damaged by Collision. No fault was imputable to either party, but as it was not caused by an act of God, or an inevitable accident, the defendants were held liable. But the court said that they would have been discharged, if a bill of lading had been given with an exception against perils of the sea. See also *Steamboat New Jersey*, Olcott, Adm., 444.

As between an underwriter and the insured owner of a ship, the former will be answerable for a loss by a Collision, although caused by the negligence of the master or crew, because it is considered as a peril of the sea; but a Collision so occurring will not exempt the owner of the vessel from being liable to the shipper of goods for damage caused to them thereby. *Clapp v. Young*, U. S. D. C. Mass., 6 Law Rep., 111; *Bulloch v. Steamboat Lamar*, U. S. C. C., Georgia, 8 Law Reporter, 275; *Waring v. Clarke*, 5 Howard S. C. R. 441, 465.

As to the necessity of vessels exhibiting a light. It seems to be a general rule of the maritime law that a vessel lying in the common passage-way of a port or river, though she have a right to be there, from necessity, or otherwise, is bound to exhibit a light conspicu-

ously in the night time. In reference to the rule requiring lights to be hung out in dark nights, it was said in *Carsly v. White*, 21 Pick., 254, that there was no general and absolute usage on the subject, and that the omission of the light might, or might not, be a fatal negligence, according to circumstances. But the Chief Justice of Pennsylvania, in *Simpson v. Hand*, 6 Whart., 324, more justly considered that the hoisting of a light in a river or harbor at night, amid an active commerce, was a precaution imperiously demanded by prudence, and he did not see how the omission of it could be considered otherwise than a negligence *per se*. Vessels when under way, as well as when at anchor, should have a sufficient watch or look-out on deck.

As steamers can go almost equally well in one direction as in another, they are considered as vessels with a free wind. They have great power and speed, and are always obliged to observe a great degree of caution, particularly at night. They must be very watchful as to their speed and course. In regard to the former, it is a question of fact in each particular case, whether the speed was excessive or not; and in determining this, the locality and hour, the state of the weather, and all circumstances of a similar nature, are to be fully considered. *McCready v. Goldsmith*, 18 Howard, 89; *Steamboat New York v. Rae*, 18 Howard, 223; *Rogers v. Steamer St. Charles*, 19 Howard, 108. If a steamboat, in consequence of excessive speed, raise so great a swell that a vessel is sunk thereby, the owners are liable. *Smith v. Dobson*, 3 Man & G., 59. In respect to a look-out, it is not enough that a person be stationed in

the pilot house for that purpose, but a vigilant watch should be stationed in the forward part of the steamer, so situated as to be able to discern vessels at the earliest moment. *St. John v. Paine*, 10 Howard, 567, 585; *Newton v. Stebbins*, 10 Howard, 586; *The Propeller Genesee Chief v. Fitzhugh*, 12 Howard, 443.

In general, established rules and known usages should be carefully followed; for every vessel has a right to expect that every other vessel will regard them; but not where they would, from peculiar circumstances, certainly cause danger, as a vessel near a rock or shore must strike it by putting her helm to port, which the general rule might require; and no vessel is justified by a pertinacious adherence to a rule, for getting into Collision with a ship which she might have avoided. *Allen v. Mackay*, U. S. D. C., Mass., 1853. In *The Commerce*, 3 W. Rob., 287, it was held that where there is a probability of a Collision, a vessel, on the larboard tack and close-hauled, is not justified in pertinaciously keeping on her course, although the vessel she meet be on the starboard tack, and with the wind free. Where practicable, she is bound to take the necessary precautions for avoiding the Collision, although the other vessel be acting wrongfully in not giving way in time.

In measuring damages in a case of Collision, all the direct and immediate consequences are to be taken into consideration; as loss of freight, detention, expense and the like. *The Gazelle*, 2 W. Rob., 279, 284.

The rule in insurance, of deducting one-third new for old, does not apply to a claim against the vessel doing damage. The owner is entitled to recover from the ship

in fault, his repairs in full. *Williamson v. Barrett*, 13 Howard, 101, 110.

The assured has a lawful right to compensation for the use of his vessel when detained to repair damages caused by Collision. *Williamson v. Barrett*, 13 Howard, 101, 111; 1 Caines, 573.

Though not recited by name in the body of the policy, damage by Collision is a frequent source of claim on underwriters. It is one of the many casualties included in "all other perils, losses and misfortunes" that may come to the hurt of the ship. The usual and common instances of Collision are obviously produced by causes, which are most certainly among the perils of the sea. They are the winds, waves, currents or tides. And so far as these cause a Collision, there can be no question of the liability of the insurer. But where a Collision is caused in part only by the extraordinary violence or unexpected operation of the wind or water, and in part by the negligence of the master and the crew, the question might arise, how far the insurers were responsible. And this question would seem to be still more difficult, when there is no extraordinary or unusual action of wind or sea, and none which might not have been, and should not have been anticipated and prepared for, and the Collision took place because the master and crew were wholly wanting in skill or care. And the case sometimes occurs, where the Collision is purposely caused by the master or crew, and is to be attributed exclusively to their intention and act.

Although the insurers do not insure the ship-owners against negligence on the part of the master and crew,

they are liable for damage caused by a peril of the sea, though that peril be put into operation by the negligence of those in charge of the vessel. *General Mutual Ins. Co. v. Sherwood*, 14 Howard, 351; *Nelson v. Suffolk Ins. Co.*, 8 Cushing, 477.

In *General Mutual Ins. Co. v. Sherwood*, it was held, that, *damages decreed by a court of admiralty to be a lien on the vessel insured, by reason of a Collision produced by the negligence of those who navigated that vessel, cannot be recovered, under a policy insuring against the usual perils and including barratry.* In this case the argument of counsel for the assured was, "that Collision being a peril of the sea, the negligence which caused that peril to occur is not inquired into; it lies behind the peril and is too remote." *Curtis*, J. delivering the opinion of the court, said: "This is true when the loss was inflicted by Collision, or was by law a necessary consequence of it. The underwriter cannot set up the negligence of the servants of the assured as a defence. But where the expense is attached to the vessel insured, not solely in consequence of a peril, but in consequence of the misconduct of the servants of the assured, the peril *per se* is not the efficient cause of the loss, and cannot, in any just sense, be considered its proximate cause. In such a case the real cause is the negligence, and unless the policy can be so interpreted as to insure against all losses directly referable to the negligence of the master and mariners, such a loss is not covered by the policy. We are of opinion that the policy cannot be so construed. When a peril of the sea is the proximate cause of a loss, the negligence which caused that peril is not in-

quired into ; not because the underwriter has taken upon himself all risks arising from negligence, but because he has assumed to indemnify the assured against losses from particular perils, and the assured has not warranted that his servants will use due care to avoid them."

"These views are sustained by many authorities. Mr. *Arnould*, in his valuable Treatise on Insurance, vol. 2, 775, lays down the correct rule : 'Where the loss is not proximately caused by the perils of the sea, but is directly referable to the negligence or misconduct of the master or other agents of the assured, not amounting to barratry, there seems little doubt that the underwriters would be thereby discharged.' To this rule must be referred that class of cases, in which the misconduct of the master or mariners has either aggravated the consequence of a peril insured against, or been of itself the efficient cause of the whole loss. Thus if damage be done by a peril insured against, and the master neglect to repair that damage, and in consequence of the want of such repairs, the vessel be lost, the neglect to make repairs, and not the sea-damage, has been treated as the proximate cause of the loss. In the case of *Copeland v. the N. E. Marine Ins. Co.*, 2 Metcalf, 432. *Shaw*, J. reviews many of the cases, and states that 'the actual cause of the loss is the want of repair, for which the assured are responsible, and not the sea-damage which caused the want of repair, for which it is admitted the underwriters are responsible.' And the same principles were applied by *Story*, J. in the case of *Hazard v. N. E. Marine Ins. Co.* 1 Sumner's Rep., 218, where the loss was by worms, which got access to the

vessel in consequence of her bottom being injured by stranding, which injury the master neglected to repair. So where a vessel has been lost or disabled, and the cargo saved, a loss caused by the neglect of the master to tranship or repair his vessel and carry the cargo, cannot be recovered. *Schieffelin v. N. Y. Ins. Co.*, 9 Johns, 21; *Bradhurst v. Col. Ins. Co.* 9 Johns, 17; *Am. Ins. Co. v. Centre*, 4 Wend., 45; S. C. 7 Cow., 564; *McGaw v. Ocean Ins. Co.*, 23 Pick., 405; *Robinson v. Jones*, 8 Mass., 536; *Cleveland v. Union Ins. Co.*, 8 Mass., 308; in these and many other similar cases, the courts, having found the efficient cause of the loss to be some neglect of duty by the master, have held the underwriter discharged. Yet it is obvious that in all such cases, one of the perils insured against, fell on the vessel, and they are to be reconciled with the other rule, that a loss caused by a peril of the sea is to be borne by the underwriter, though the master did not use due care to avoid the peril, by bearing in mind, that in these cases, it is negligence, and not simply a peril of the sea, which is the operative cause of loss. It may sometimes be difficult to trace this distinction, and mistakes have doubtless been made in applying it, but it is one of no small importance in the law of insurance, and cannot be disregarded without producing confusion. The two rules are in themselves consistent. Indeed they are but applications, to different cases, of the maxim *causa proxima non remota spectatur*. In applying this maxim, looking for the proximate cause of the loss, if it be found to be a peril of the sea, we inquire no further; we do not look for the cause of the peril. But if the peril of the sea

which operated in a given case, were not of itself sufficient to occasion, and did not in and by itself occasion the loss claimed, if it depended upon the cause of that peril whether the loss claimed would follow it, and therefore a particular cause of the peril be essential to be shown by the assured, then we must look beyond the peril to its cause, to ascertain the efficient cause of the loss."

"The case at bar presents an illustration of both rules, so far as the brig Emily (the vessel insured) was herself injured by the Collision, the cause of loss was the Collision, which was a peril insured against, and the assured, showing that his vessel suffered damage from that cause, makes a case, and is entitled to recover. But he claims to recover not only for the damages done to his vessel, which was insured, but for damages done to the other vessel, not insured. To entitle himself to recover these, he must show not only that they were suffered by a peril of the sea but that the underwriter is responsible for the consequences of that peril falling on a vessel not insured. It is this responsibility which is the sole basis of his claim, and to make out this responsibility he does not, and cannot, rest upon the occurrence of a Collision; this affords no ground for this claim; he must show a particular cause for that Collision; and aver, that by reason of the existence of that cause, the loss was suffered by him, and so the underwriter became responsible for it."

"This negligence is therefore, the fact without which the loss would not have been suffered by the plaintiff, and by its operation the loss is suffered by him. In the

strictest sense it causes the loss to the plaintiff. The loss of the owners of the "Virginian," was occasioned by a peril of the sea, by which the vessel was injured. But nothing connects the plaintiff with that loss, or makes it his, except the negligence of his servants. Of his loss, this negligence is the only efficient cause, and in the sense of the law it is the proximate cause."

As to the question, *whether the underwriters on one vessel be liable to damage done to another vessel, not insured by the policy, by a Collision caused by the negligence of those on board the vessel insured*, Judge Curtis continued, "the ablest writers of the continent of Europe, on the subject of insurance law, have distinctly declared that in case of damage to another vessel solely through the fault of the master or mariners of the insured vessel, the damage must be repaired by him who occasioned it, and the insurer is not liable for it. *Pothier Traite d'Assurance*, No. 49, 50; *Boucher*, 1500, 1501, 1502; 4 *Boulay Paty, Droit Maritime*, ed. of 1823, 14, 16; *Santayras' Com.* 7, 223; *Emerigon*, by Meredith, 337. If the law of England be to be considered settled by the case of *De Vaux v. Salvador*, 4 Ad. & El., 420, it is clear such a loss could not be recovered there. Mr. *Marshall* is evidently of opinion that unless the misconduct of the master and crew amounted to barratry, the loss could not be recovered. Marsh on Ins., 495. And Mr. *Phillips* so states in terms, 1 Phillips, 636. It has been urged that, in case of *The Paragon*, 14 Peters, 99, this court adopted a rule which if applied to the case at the bar, would entitle the assured to recover. But we do not so consider it. It was there determined that a

Collision without fault was the proximate cause of that loss. Indeed, unless the operation of law, which fixed the lien, could be regarded as the cause of that loss, there was no cause but the Collision, and that was a peril insured against. We are aware that in the case of *Hale v. Washington Ins. Co.*, 2 Story, 176; *Story*, J. took a different view of this question; and we are informed that the Supreme Court of Massachusetts has recently decided a case in conformity with this opinion, which is not yet in print, and which we have not been able to see. But with great respect for that very eminent Judge, and for that learned and able Court, we think the rule we adopt is more in conformity with sound principle as well as with the practical interpretation of the contract by underwriters and merchants; and that it is the safer and more expedient rule. We cannot doubt that the knowledge by owners, masters and seamen, that underwriters were responsible for all the damage done by Collision with other vessels through their negligence, would tend to relax their vigilance and materially enhance the perils, both to life and property, arising from this case." This decision was rendered during the December term of the Supreme Court, 1852.

In Massachusetts, in the case referred to by Judge *Curtis*, in the opinion we have just cited, it was decided by the Supreme Court of that State (*Nelson & others v. Suffolk Ins. Co.*, 8 Cushing, 477), in October term, 1851, that the underwriters are liable for the whole loss, consisting of both of these items, because the whole loss is caused by Collision, and that is a peril insured against. The Court of Appeals of New York (*Matthews v. How-*

ard Ins. Co., 1 Kern, 9), overruling a decision in the Supreme Court of that state (*Matthews v. Howard Ins. Co.*, 13 Barb. 234), held that the insurers are liable only for the damage sustained by the vessel insured, if the Collision be caused by the fault of the officers and crew of that vessel ; and are not liable for the compensation due from it for the injury inflicted upon the other vessel. The principle which governs this case is, that the proximate cause only is to be regarded, and the remote cause disregarded. And, while the law will hold the insurers of the ship in fault liable for the injury immediately caused to the insured by the negligence of their servants it does not pursue the chain of effects, and hold these insurers liable to the owners for the money, which a rule of admiralty, or of the law of shipping, requires them to pay to others for the damage their servants do them.

Mr. *Parsons*, in his valuable treatise on Maritime law, commenting on these decisions says : “ We think, that the decision of the Supreme Court of the United States rests upon the better reason, and a just application of indisputable principles. But a similar application of the same principles, would require the court to abandon the ground formerly taken by them in another case. That was a case of Collision in the river Elbe, where the vessel insured, without default, came into Collision with another vessel. By a law of Hamburg, which governed the place where the Collision took place, the loss, when there was no fault, was divided between the two ships ; instead of resting where it fell, as it does by the common law, and the law merchant generally. Mr. Justice

Story held, that the insurers of the ship were obliged to pay, not only for what she herself suffered, but for all the money awarded to the other ship, by the law requiring a division of the loss (*Peters v. Warren Ins. Co.* 3 Sumner, 389). And the Supreme Court unanimously affirmed his decision (*Peters v. Warren Ins. Co.*, 14 Peters' S. C. R. 99)."

"Two years before the trial of this case before Mr Justice *Story*, the very same question came before the King's bench in England, Lord *Denman* presiding, in reference to a ship injured without fault, by Collision in the river Hoogly, and compelled by a similar law of Calcutta, to pay for a part of the injury sustained by the other vessel. The English court held, that this part of the loss was too remote; and that the insurers should pay only for the injury sustained by the vessel insured. *De Vaux v. Salvador*, 4 A. & E., 420."

"We think this last a just decision; and are quite sure, that the same principles which were acknowledged and applied by the Supreme Court of the United States, in *General Mutual Ins. Co. v. Sherwood* (14 Howard, 351), and by the New York Court of Appeals in *Matthew v. Howard Ins. Co.* (1 Kern., 9), would lead directly and necessarily to the conclusion to which the English court came in *De Vaux v. Salvador* (4 A. & E. 420), although a distinction has been pointed out between these cases." 2 *Parsons*, 228.

The question is generally settled by the underwriters, providing in their policies, whether they shall or shall not be liable for such a loss. The underwriters of Boston have introduced the following clause into their policies;

"This company agrees to cover the risk of loss by Collision, according to the decisions of the courts of Massachusetts prior to 1853; provided that the company shall not in any case be liable for a greater sum than the amount insured by this policy on ship and freight." This clause however is introduced only when the assured pays an additional premium therefor, say, of one per cent. When this extra premium is not paid, this clause is erased, and the following substituted: "It is understood, that this company is not in any case to be liable for damage to another vessel or her cargo by Collision with the vessel hereby insured."

In cases of Collision, the first remedy of the owner is against his underwriters if he choose to take it, and he may afterwards at the request, and on behalf of the insurers take proceedings against the vessel by which his own was injured. What he recovers is for the benefit of his underwriters. But if they have paid his claim, deducting the usual third from repairs, and he afterwards recover from the other ship his repairs in full, it is not usual to return more to the insurers than suffices to wipe off the sum they settled and any law expenses afterwards incurred, and he will be allowed to retain the rest on his own account. As in nearly all these cases, a settlement by the other vessel is preferable to a settlement by underwriters, for among other advantages the thirds are saved, an owner often elects to take his remedy in the first instance against the colliding ship. And if he appear as plaintiff in an action against the other ship, his right of recovery from the underwriters is not defeated. This is provided for by the policy it-

self, which states: "And in case of any loss or misfortune, it shall be lawful for the assured to sue, labor and travel for &c., without prejudice to this insurance, to the charges whereof the underwriters will contribute &c." However, before taking legal proceedings in a Collision case, it is advisable to first obtain the sanction of the underwriters, otherwise, in case of defeat, it is questionable whether the underwriters would be liable for any part of the court expenses, and we doubt very much whether they are legally liable for the expenses any how, unless their consent be first obtained. And, but for the clause in the policy, to which we have referred, we think the assured having elected to take his remedy against the colliding ship, and having gained his suit, he is barred from any further claim for indemnity from his underwriters. But, we think it would be manifestly against the interest of the underwriter to take advantage of the steps which a master or owner makes for his benefit, and endeavor to escape from liability on the policy; such a course would tend to prevent the assured from doing what is in his power, to protect the underwriter's interest as against third persons—feeling that he could always recover on his policy, he would take no steps that might prejudice his own rights, but would leave the underwriters to look after their own interests themselves. There are many things which a master or owner, from his position, can know, or do, which the underwriter is ignorant or incapable of; and, therefore, it becomes the incumbent duty of the former to act so that the insurers may not be put to unnecessary loss. And when this is done, in good faith, we think the un-

derwriters are equitably bound to indemnify the assured for the expenses he may have incurred.

In cases of Collision, when the amount of the damage is ascertained by a proceeding *in rem*, the lien of damage to the extent of the value of the vessel takes priority of all other liens. Hence, if the guilty ship be sufficient to meet all demands, the lien of damage must be first satisfied. But where the guilty vessel has been repaired after the Collision, by means of a bottomry bond, the lien of damage does not extend.

CHAPTER VIII.

GENERAL POWERS AND DUTIES OF THE MASTER.

The master of a ship holds a highly responsible position. There is probably no person more liable to be placed in situations of difficulty and of danger, situations requiring caution, self-dependence and integrity. Cases are constantly arising in which he must act promptly for the good of all concerned, and that, too, without having the aid of precedents to guide his decision. He requires, therefore, a sound and matured judgment, and should be well acquainted with maritime laws, usages and customs. In a case of necessity, or of unexpected and pressing calamity, happening in the course of the voyage, the master is by law created an agent from necessity, for the benefit of all concerned ; and what he fairly and reasonably does, under such circumstances, in the exercise of a sound discretion, generally binds all the parties in interest in the voyage, whether owners or shippers or underwriters. *Jordan v. Warren Ins. Co.*, 1 Story, 353. As the owner is bound, in order that his ship may be seaworthy, to put in command of her a master who is fully competent in

respect of skill, care and honesty, so the master is bound to all whose interests are under his charge, as owners of the ship, or hirers of it, or as owners of the goods, or even as insurers of the ship, goods or freight, to use proper care and skill, and entire integrity in the protection and preservation of their interests. It is impossible to define all his duties, or state them in detail. Some of them, and some of the most important among them, arise on extraordinary occasions only; and must be measured and defined by the circumstances of each case, and the exigencies which it presents. There are some general principles of law and usage, however, a knowledge of which may aid him in determining what he ought to do in certain emergencies, for the protection and advancement of the general interest, and these we will endeavor to state for his guidance.

The great object which the master is bound to keep in view, with respect to the *cargo*, is its *safe* and *speedy* conveyance to its destined port. In general, the master is a stranger to the cargo, any further than he is concerned in its safe custody and conveyance. But in case of *unforeseen* and *unprovided* for necessity, the character of agent and supercargo is forced upon him by the general policy of the law. If the ship have put into a port of necessity in distress, and need repairs to enable her to pursue her voyage, the master is bound to take the most prompt measures to hasten forward the cargo. But in this he is not entirely to lose sight of the interests of the ship-owner. His duty is, first, to repair the ship, if practicable. If the ship cannot be repaired in season to carry on the cargo, or be so disabled as not to be worth

repair, then his duty towards the cargo is first to tranship it, and send it on by another vessel, if one can be found in that or a neighboring port. If no such vessel can be procured, or not without an expense totally disproportioned to the advantages expected to be derived from sending the goods forward, then he may store them, or if they be of a *perishable nature*, he is bound to sell them. If, however the vessel be capable of repair within a reasonable time, he must repair, if the necessary funds can be procured.

The master must, we repeat, bear in mind, that he has been entrusted with the cargo, for the purpose of conveying it to its place of destination, and this purpose he is bound to accomplish by every reasonable and practicable method. Where a part only of the cargo is saved, or the whole is materially damaged, the duty of transshipment may depend, in part, upon the quantity saved, and the additional damage to which the goods would be liable by being reshipped and carried on in their damaged condition. In case of transshipment, the shipper is bound to pay the *extra* freight for the renewed voyage, which the master pays for the hire of the vessel which he procures. But the master is not justified in transshipping the cargo, if his own vessel can be repaired at a reasonable expense and in reasonable time, and if he do tranship it in such case, the insurers on the cargo will be discharged.

Though the underwriter upon freight will not be liable for a loss of freight, unless the delivery of the goods be prevented by a peril insured against, and though the shipper will not be liable to pay freight,

unless the goods be delivered at the port of destination, or he voluntarily accept them short of that port, yet where the goods are so much injured that, though capable of being carried to their port of destination and there landed, they will endanger the safety as well of the ship as of the goods, or the goods will become perfectly worthless on arrival at the port of destination, it is the duty of the master, exercising a sound discretion, for the benefit of all concerned, and especially for the shippers of the cargo, to sell the same at the port where the necessity arises. But, in general, it is his duty to carry the cargo to its port of destination, if the goods can there be delivered in a merchantable though damaged state. *Jordan v. Warren Ins. Co.*, 1 Story, 343.

Previous to a sale of goods on the ground of their being in a perishable condition, the master should have them surveyed, and their condition reported by competent persons. And where there is an agent of the underwriters resident, the master should call him in to assist and advise. Though the recommendation of a sale by surveyors, or even by the underwriter's agent, will not justify the master in making it, where the facts themselves do not justify him, a survey, nevertheless, secures witnesses to the facts, and is usually looked for and expected by the parties interested. And the consultation with, and approval of, the underwriter's agent, will go far towards reconciling his acts to the minds of both shippers and underwriters.

If the ship cannot be repaired, or another procured, if the cargo be not perishable, it is the duty of the master, ordinarily, not to sell the cargo, but to store it, and a-

wait the orders of the shippers or underwriters, who ought to be consulted without delay. Where a vessel was stranded on the coast of Virginia, and the cargo was landed without damage, and was not of a perishable nature, and might have been kept in reasonable safety until the owners and insurers who lived in Massachusetts, could be heard from, it was held, that the master had no authority to sell the cargo without waiting until the owners and insurers could be consulted. *Bryant v. Com. Ins. Co.*, 13 Pickering's R., 543. And where a vessel, laden with fruit and wine, bound to Philadelphia, put into Bermuda, where, upon a survey, the fruit was found to have been wet and damaged, and to be in a perishable condition, the vessel being condemned and sold, and the master having afterwards sold the cargo, it was held, that the sale of the fruit was rightful, but the sale of the wine was wrongful. "The port of Bermuda," says the court, "was near to the United States, and the means of communication with the consignees and the other parties interested, were easy and capable of being accomplished in a brief space of time." *Pope v. Nickerson*, 3 Story, 465.

The master is bound to take all possible care of the cargo. If the ship be stranded, the duties and liabilities of the owners and master are not varied by that event but continue as before. They are bound to show that no human diligence or skill could save the property from being lost by the shipwreck, but that it perished with the wreck. After any loss of, or damage to, the goods is shown, the burden lies upon the carrier to show that it was occasioned by one of the perils from which

he was exempted by the bill of lading. In *Cordes v. Propeller Niagara*, 21 Howard, 7, the Supreme Court of the United States held, that the ship-owner was liable for loss and damage happening to the cargo after the ship had stranded, because the master did not sufficiently exert himself to prevent such loss or damage. A loss of the goods caused by negligence, carelessness or unskilfulness, or any loss, which might have been prevented by human exertions, is not a loss by a peril of the sea, which exonerates the master and ship-owner under their bill of lading from liability.

When goods are found to be damaged in an intermediate port, the master should take care that they are carefully examined by competent persons, who will recommend the proper steps to be taken for drying them &c.

Masters sometimes think, that where the *whole* cargo cannot be forwarded, it may be sold. This is a wrong impression. It makes no difference that the *whole* cargo cannot be forwarded; if any part can be sent on in a comparatively undamaged state, it ought to be transhipped, and cannot rightfully be sold. Thus where part of a cargo of indigo, shipped from Calcutta to England, was saved, without any material damage, from the wreck of the ship and landed at the Cape of Good Hope, and there sold by the master, instead of being forwarded, as it very shortly afterwards might have been, by another ship, the court held that, as the jury had found such sale, under the circumstances, not to be necessary, it could vest no title in the purchaser. *Free-*

man v. East India Comp., 5 B. & Ald. 617. It is the duty of the master, in such a case, to warehouse the cargo till the owner's directions are received as to what is to be done with it. But if the cargo be so damaged, as not to be in a merchantable state at the time of the casualty—if it be certain that, if sent on to its port of destination, it will be destroyed by putrefaction, arising from sea-damage, before arriving there—if, in short, considering the nature and condition of the cargo, and the cost of transhipment, a prudent owner, if uninsured and on the spot, would, in the exercise of a sound discretion, rather sell than tranship, the sale by the master will be justified.

The cost and difficulty of transhipment, as compared with the probable worth of the cargo, if forwarded, is, undoubtedly, a circumstance fit to be taken into the master's consideration in electing whether to sell or tranship. This will be shown by the two following cases—A cargo of *coffee, sugar and tea*, was landed, without damage, after the wreck and total disability of the ship, on the coast of Virginia, about forty miles from the port of Norfolk, to which port the master might have transported it by land, and thence forwarded it to its port of destination by another vessel at an expense altogether less than one-third of its invoice value. Instead of doing so, however, he sold it on the beach for within a fraction of that value; this was held to be neither a rightful sale, nor a case of constructive total loss. *Bryant v. Commonwealth Ins. Co.*, 6 Pick., 131. On the other

hand, where a cargo of *wheat* was saved from a stranded ship, and got ashore much damaged, on an open beach, many miles from the nearest port, to which it must have been transported partly along the beach, and then carried several miles in boats with great hazard, the court held, that these facts justified an abandonment, because the master, as the agent of the assured, was not in this case bound to tranship. *Treadwell v. Union Ins. Co.*, 6 Cowen's R., 270. One ground of distinction between these two cases, was undoubtedly the different nature of the respective cargoes, the expense of transporting coffee, sugar and tea, being very trifling, *in respect of their value*, in comparison with that of transporting grain.

Jordan v. Warren Ins. Co., 1 Story, C. C., 342, was a case of insurance on freight, on a voyage at and from New Orleans to Havre. The vessel was compelled to put back to New Orleans, in consequence of an accident. The cargo consisting principally of cotton, was so much damaged, that it would require several months to pack it in a condition to be reshipped, and it was sold by the consent of the master and shippers; and the vessel having taken another cargo on board proceeded on a different voyage. A total loss on freight was claimed. *Story, J.* said: "The jury have, indeed, found that the master in delivering up the cargo, and allowing the sale thereof at New Orleans, performed his absolute duty to the owners of the cargo, and ought not to have undertaken to carry it forward to its destination in its then damaged state. And I think that the jury were well

warranted in their finding ; for when a cargo on freight is so much injured, that though capable of being carried to the port of destination and there landed, it will endanger the safety, as well of the ship as of the cargo, or it will become utterly worthless on arrival at the port of destination, it is the duty of the master, exercising a sound discretion, for the benefit of all concerned, and especially of the shippers of the cargo, to land and sell the same at the place where the necessity arises, whether it be the original port of shipment to which the ship returns, or any intermediate port, at which the ship arrives in the course of the voyage. It would be contrary to common sense and common justice for him to sacrifice the cargo for the benefit of another party in interest ; or to elect the party, upon whom the ruin, caused by a common calamity, should fall. In a case of necessity, or of unexpected and pressing calamity, emergent in the course of the voyage, the master is, by law, created an agent from necessity for the benefit of the concerned ; and what he fairly and reasonably does, under such circumstances, in the exercise of a sound discretion, binds all the parties in interest in the voyage, whether owners or shippers or underwriters. But then, the question still remains, upon whom is any given loss to fall ? And it by no means follows because a sale of the goods has taken place at a port short of the port of destination, by reason of a damage sustained by the cargo, the cargo specifically remaining, and capable of being carried to its destination,* that there is no freight due thereon by the shippers ; but that the whole loss is to be borne by

the underwriters on freight."

"Let us see, then, how upon principle the case stands, as between the shippers of the cargo and the owners of the ship. We must take it, in the present case, that the sale was with the entire consent and approbation of the shippers, as well as the master, and for the benefit of the former. Now nothing is better founded in the law on this subject, than that the shippers are bound to pay the full freight for the voyage, if the cargo be carried to the port of destination, and specifically remain, notwithstanding at its arrival it be, by reason of sea-damage, utterly ruined and worthless. This doctrine, although formerly a matter of some doubt, is now firmly established, and indeed, must be manifestly correct upon principle. It is as clear, that after the shipment of the cargo on the voyage, the shippers have no right to demand it at any intermediate port short of the port of destination, without payment of the full freight for the voyage, whether the cargo arrive there in a damaged or in an undamaged state. The reason is obvious. The master has a right to carry on the cargo to the port of destination; and if his ship be capable, either then, or within a reasonable time, of carrying the cargo to the port of destination, there is no ground to say, that he is not entitled to earn a full freight; and the shippers of cargo cannot insist upon changing the original contract *in invitum*, and cut him off from all freight; or dismiss him with a *pro rata* freight."

"The contract of the ship-owner is to carry the cargo to the port of destination; but he by no means warrants the state, in which it shall arrive, as it may be affected

by the perils of the seas, or other perils, against which his contract does not bind him. It is no answer to say, that if the cargo be carried on in a damaged state, it will be ruined. The true reply is, that the ship-owner has nothing to do with that; and that the shippers have no right to throw the loss of freight upon him, because the cargo is in danger of ruin by a calamity against which he did not warrant them."

"How then, do these principles apply to the circumstances of the present case? The ship was repaired and capable again of taking on board the cargo, at New Orleans, within a reasonable time. The master had a right to require, that it should be so taken on board and carried on the voyage, as soon as it should be in a condition to be safely re-shipped. He had a right to wait until the cargo could be dried, sorted, re-packed and prepared for re-shipment. The delay, arising thereby, would be a mere retardation or temporary interruption or suspension of the voyage, and not an utter prostration or destruction of it. If, then, the freight have been lost, it has been lost by his own voluntary act, and not by the necessary operation of any of the perils insured against. The whole evidence shows, that the cargo could have been dried, sorted and re-packed safely for the voyage, and at the farthest, within six months. Mere delay in the voyage or disappointment as to the time of arrival, constitutes as we have seen, no ground for an abandonment of the voyage. So that, here, the loss of freight has been by a voluntary abandonment of the voyage by the master; and not from necessity, superinduced by any perils insured against."

“Then how stand the shippers of the cargo? They could not require the cargo to be re-delivered to them without the payment of freight for the voyage; and if they did not choose to pay the freight, the master had a right to retain the cargo for the payment thereof, or to prepare it again for re-shipment, as soon as it could be safely done, unless the owners refused to allow it to be again shipped on the voyage. If they did so refuse, then the contract for full freight would have been complete on the part of the ship-owner, from the default on the other side. But we must take the case here to be, what in reality it was, a mutual voluntary agreement on the part of the master and the shippers, that the damaged cargo should be sold. The sale must therefore be treated as a sale reserving all the rights of the respective parties. And, in my judgment, the ship-owner was, for the reasons already stated, upon principle, entitled, under all the circumstances, to a full freight for the voyage, upon all the goods so sold or relinquished. He has, therefore, not lost his freight for the voyage, from any perils insured against; but is a clear right now existing against the shippers of the cargo, or, if lost, it has been lost by the voluntary relinquishment of the master and owner, by their own act or default.” See also *Herbert v. Hallet*, 3 John Cas, 93; *Griswold v. the New York Ins. Co.*, 1 John R., 204; *Saltus v. Ocean Ins. Co.*, 14 John R., 138; *Whitney v. the New York Ins. Co.*, 18 John R., 208; *McGaw v. the Ocean Ins. Co.*, 2 Chandler’s Law Reporter, 363. As far as the American authorities have gone, they uniformly sustain the doctrine we have cited above. The question has arisen

also in England ; and has there received a similar determination, see *Mordy v. Jones*, 4 Barn & Cress., 394.

It is often said in books, that where cargo is delivered to the owner at the intermediate port, or sold for his benefit, a *pro rata* freight is due. *Pro rata freight* has no existence in law, or in commercial usage, except as a compromise made by the owner of a cargo with the owner of a ship, where the former agrees to receive his goods short of their port of destination from some cause, when he agrees to give a partial freight, and the ship-owner agrees to accept it and deliver the goods. But in law, insurance, and the adjustment of Averages, there is no such thing as *pro rata freight*. No such thing can be demanded or recovered as a legal right dependent upon the contract of affreightment. It must be a question of *full freight* or of no freight earned.

A *sale of the ship* is frequently made by the master ; and if this be justified by necessity it is valid. He has, however, no authority to sell the vessel, except in the exercise of good faith, and upon the compulsion of a necessity to be determined in each case by the actual and impending peril to which the vessel is exposed, which must be such as to render it probable, in the opinion of persons competent to judge, that the vessel cannot be saved, and which must be so pressing that the owners and underwriters cannot be informed of the situation of the vessel in time to direct the master, before she will probably be lost. If there be a probability of loss, and it be made more hazardous by every day's delay, the master may then act promptly and sell the vessel, if that be the best thing that can be done, in order to save some-

thing for the benefit of all concerned, though but little may be saved. Where he has authority to sell the hull of a stranded vessel, he has authority to sell the sails, rigging and anchors taken or saved from her. If the vessel be in, or may be put in, a place of safety, and the owners or insurers can be informed, the master has no authority to sell it, however much it may be damaged. *Hall v. Franklin Ins. Co.*, 9 Pick., 477; *Pierce v. Ocean Ins. Co.*, 18 Pick., 88.

Whether the mere want of funds can be of itself a sufficient necessity to justify a sale of the ship by a master has been much disputed. But we strongly incline to the conclusion, that a master can have no power *from necessity* to sell a ship that is not a wreck. It is true that the master may have no funds with him, and that his owners may not be known, or their pecuniary responsibility ascertained where his ship needs repairs; but it is not easy to imagine a place where extensive repairs could be made, and yet no money be raised on bottomry of the ship. To meet this very emergency, the law and custom of bottomry are universal. If the requisite repairs would cost so much that the ship, when repaired, would not suffice as security for the sum, then the greatness of the injury, as measured by this cost, might be equivalent to a wreck, and on this ground justify a sale. If the injury be less, so that a comparatively small sum would repair her, but that cannot be raised, then it is a question whether the master should sell at once, or delay the sale until orders can be received from the owners. And, although there may be peculiar cases and emergencies, which must be judged of by themselves,

as a general rule we should have no hesitation in saying, that the master, of a ship thus slightly injured, would have no other right than to let her lie in port, with all possible precaution against deterioration, until he could hear from his owners. There may be, perhaps, a case in which the master may be justified in selling by a mere *pecuniary* necessity; but this must be extreme and unquestionable; it must be such as to come clearly within the rule already laid down, and make it indisputably certain that the owner himself, if there under similar circumstances, would have found a sale the only thing he could do; for, it must be such as to show that the sale was *clearly of necessity* and not of *expediency* only.

The schooner *Margaret Hopping* (Ruckman v. M. L. Ins. Co., 5 Duer, 366), on a voyage from New York to San Francisco, put into Valparaiso as a port of necessity for repairs, the master was unable to raise the necessary funds on bottomry, and abandoned and sold his vessel without consulting his owners. On these two points Judge *Duer* says: "For aught that appears, the condition of the vessel at Valparaiso was one of entire safety, and it is proved that the master might have communicated with his owner in this city, by the Panama route, and received an answer within eighty, at the utmost ninety, days from the date of his letter. We are bound to presume that the plaintiff, upon being informed of the exact situation of the vessel, and of the inability of the master to make the repairs she needed, could and would have remitted to him the necessary funds, either in bills, or by opening a credit in his favor

with a house in Valparaiso. Let an additional month be allowed for repairing the vessel, and another for the time that would have elapsed from the arrival of the vessel at Valparaiso, until the failure of the master to raise the funds that he required ; we have thus five months as the full period that would have elapsed, had the course that has been indicated been followed, from the first arrival of the vessel at Valparaiso until she would have been fitted by sufficient repairs to resume the voyage. And the question, therefore, is, whether the fact that this, or even a greater delay, in the resumption of the voyage, must have intervened, had the master elected to remain at Valparaiso until he obtained from his owner the funds that he required, created of itself, independent of any other circumstance, a constructive total loss, that warranted the master in breaking up the voyage, and justified an abandonment by his owner. We are satisfied, both on principle and upon the authorities, that to this very material question, no other than a negative answer can be given."

The master's authority to sell the vessel or cargo is in no manner increased or diminished by the owner's abandonment or right of abandonment to underwriters ; nor by the recommendation of surveyors or bystanders ; but, as we have seen, is solely dependent upon the existence of an honest purpose on his part to do the best in his power for all concerned, and upon a moral necessity so urgent, under the actual circumstances, as to make a sale necessary, as a proper discharge of duty to the owners, in order to prevent a greater loss. Good faith and necessity for the sale must both concur to make the sale

valid. To exonerate themselves from damages for a tortuous conversion, the master and ship-owner must show this concurrence; and the purchaser, to protect his title, must in like manner prove the good faith of the master and the necessity for the sale. The order of court, or of port wardens, or of any other tribunal, for a sale, procured by the master, will not make the sale legal, where the required necessity and good faith do not exist. The master's sale is subject to review in the home tribunals, and can be defended only by showing the facts and circumstances under which it was made. *The Sarah Ann*, 13 Peters, 387; *Patapsco Ins. Co. v. Southgate*, 5 Peters, 620; *Robinson v. Comm. Ins. Co.*, 3 Sumner, 221; *Post v. Jones*, 19 Howard, 150; *Hall v. Franklin Ins. Co.*, 9 Pick., 466; *Prince v. Ocean Ins. Co.* 40 Marine R. 481.

At one time, a distinction was made between the power of the master if abroad, or if wrecked on the coast of his own country. But this has disappeared. The only rule now is, that he must inform his owners, and wait their instructions if he can. The general introduction of the electric telegraph, will much extend the possibility, and consequent duty. For let the master be where he may, and his owner far or near, it is certain that he can dispossess the owner of his property by a sale, only when his authority for this rests on necessity, and only when that necessity is such as to preclude intercourse between them without an unreasonable exposure of the property to peril. In other words, if he can become the agent of the owner with instructions, then he cannot be his agent from necessity. *New England Ins.*

Co. v. brig Sarah Ann, 13 Peters, 387, 401 ; *Pike v. Balch*, 38 Maine, 302 ; *The brig Sarah Ann*, 2 Sumner, 215.

In every case of *disaster*, the master should cause a faithful and minute record of all that transpires to be entered in the ship's log book, and so far as can be ascertained, all articles carried away by the violence of the gale, or sacrificed for the general benefit, should be noted. In fact, the log-book should contain a correct and clear statement of the events of the voyage. This will materially aid the notary in the extension of the Protest, and will furnish, frequently, the best evidence by which to enable the owner to collect his claim of the underwriter. Protests unsubstantiated by the log-book, are often regarded with suspicion, the underwriter is apt to consider them colored or as setting forth the result of the gale in the strongest possible light. And if the master be compelled to put into an intermediate port for repairs to his ship, he should be careful to communicate all the circumstances, including the probable cost of repairs, to the owners, consignees or underwriters, as they may be most near or easy to be sent to. Delay from want of communicating intelligence, is often very injurious to those interested.

When substantial repairs are needed, the master should seek for good and economical mechanics ; superintend the work himself, carefully note the time the mechanics are employed, and materials used ; and see that credit for old material, and discount for prompt payment be duly deducted from the bills.

If the vessel be compelled to seek a port, where full repairs cannot be made at all, or without extraordinary expense, temporary repairs should be put on the vessel, to enable her to reach the nearest port where the needed repairs can be made, or to complete the voyage. These temporary repairs are generally paid in full by the underwriters, *i. e.* without the deduction of one-third new for old; and full repairs can always be made after getting into a suitable port for repairing, at the expense of the underwriters as in other cases.

If spars be sprung, or sails or rigging injured, and cannot be readily replaced, or without great expense, every expedient with which a practiced seaman is ready, ought to be resorted to, in order to make the injured articles serve until arrival at some conspicuous port where the repairs can be done completely. The repairs can then be made with advantage to all parties, without delay of the voyage, or an extravagant extent of expenditure, which is always more or less to the discredit of the ship-master. Many masters are under the impression that where the vessel is fully insured, the disaster furnishes a good pretext for the owner's putting the ship in thorough condition at the expense of the underwriters; this, to say the least, is highly dishonorable, and discreditable alike to the master and owner; besides the master should bear in mind, that in nearly all cases, one-third of the gross repairs, whether they be of a General Average or Partial Loss character, falls on the owners. To endeavor to collect from the underwriters, for repairs, not arising from the perils insured against; or to pay for old defects or decay; or for improvements,

is nothing less than an attempt at fraud ; and when discovered, injures, forever, the character of the master and of the ship, in the estimation of the underwriters.

The master should also endeavor to guard against the impositions that are frequently attempted by the parties to whom he has consigned his vessel, at an intermediate port. In some places, the commission charged on the value of cargo landed and re-shipped, called a custody commission, is enormous, and wholly disproportioned to the labor or responsibility incurred. When the discharge of cargo is found to be absolutely necessary, the master should ascertain, before he proceeds with the discharge, what this commission will be, and if an unreasonable sum be required, he should keep the entire control of the cargo in his own hands, hiring store-room himself. But after the master has fully consigned his ship, it is sometimes found too late to obviate these excessive charges. He should therefore make no consignment, until all expenses, for repairs, commissions &c. are known, by estimate or otherwise. A proper charge for storage, and a regular commission for the general business of the ship under repair, will afford, in most instances, a fair and adequate remuneration. It is always proper to have suitable men employed to watch and take care of the cargo, whose compensation will fall into an average, general or partial, and without any deduction. A reasonable compensation to the merchant for his actual trouble, responsibility and services, will be justly chargeable and freely allowed ; but the difference between such charges and a commission on the whole cargo, will be obvious to every shipmaster. During the

winter of last year (1866), a vessel, with a valuable cargo, was dismasted and put into an intermediate port for repairs. At the request of the underwriters, the author of this work went out to advise with the master, as to the measures to be taken for the general benefit. It was found that the cost of landing, storing and re-shipping the cargo, exclusive of commissions, would be very great. This expense was obviated (the cargo not being damaged), by sufficient cargo being broken out at one of the hatches, and placed on the deck of the vessel, carefully protected by tarpaulins &c. The old mast was taken out and a new one stepped. The cargo was then restowed, and the same course pursued at the other hatch. And all the repairs were made without any portion of the cargo being landed. It is needless to add, that considerable expense was saved—the master readily co-operating with the underwriter's agent.

When goods are found damaged in an intermediate port, the master, as we have seen, should take care that they be carefully examined by competent persons, who will recommend the proper steps to be taken for drying them &c. And, if there be danger of their perishing, or of injury to the other parts of the cargo by their re-shipment, a sale should be made of such portions as will avoid this inconvenience; bearing in mind, however, the rules of law we have already cited and laid down for the master's guidance in this respect.

It not unfrequently happens that vessels are sold by masters abroad, simply because funds cannot be readily obtained to pay for repairs, and it has become a system in many places, to advertise for a loan on bottomry, and

in case no offer is made within a few days, to sell the vessel. We have, elsewhere, endeavored to show, that there is no justification for the sale of the vessel in the mere fact that money cannot be had on bottomry to pay for the repairs she needs. If the vessel be in good safety, and can remain so until her owners or their underwriters can be informed of the want of money to pay for repairs, the master has no legal authority to sell her, and any title he attempts to give will be invalid. It is only when the vessel is so situated that there is imminent danger of her being totally lost, while waiting for advices from her owners, that the master is justified in selling her.

When the master is compelled to pay the disbursements by means of a bottomry bond, he should endeavor to reduce the amount to be borrowed as much as possible, by applying the sale of any condemned stores of the ship, and the proceeds of any damaged goods, part of the cargo, which surveyors have recommended to be sold on the spot, in diminution of the amount of disbursements. Sometimes it is impossible to raise money at all on bottomry; and sometimes the rate demanded is so high as to appear ruinous, and other means of raising funds are resorted to. The master under such circumstances, may proceed to sell a portion of the cargo; but he has no right to sell an entire cargo at an intermediate port, to raise funds to repair his vessel. He has the same right to sacrifice a part that the remainder of the interests may reach their destination, that he has to throw a portion into the sea to procure the safety of the rest. A sale of part of the cargo should not be resorted to except

in the most urgent cases, and where the cargo will bring reasonable prices. For, what is sold must be accounted for at the prices it would have brought on its arrival at the port of destination, which frequently will be with a heavy profit, and be ruinous to the voyage. This matter of selling should be carefully examined when proposed; no more than is absolutely necessary should be disposed of; and the latest prices at the place of destination of the cargo to be offered for sale, should be first ascertained, before such a decision be taken, and a selection made of such cargo as is likely to occasion the least loss.

Should it be necessary to jettison a part of the cargo, care should be taken to throw overboard the least valuable and most weighty parts of it, if time and other circumstances will permit of the selection being made.

It is the duty of the master's consignee to assist him in repairing the ship, and in preserving and taking care of the property. He ought to furnish the master with honest and true accounts, and if he furnish him with fictitious or overcharged bills, with a view to enable him to make money out of his owners on a settlement with them; or to enable the owners to make money out of the underwriters, he will forfeit his right to recover of the owners the money truly advanced by him; and a bottomry bond, taken by him under such circumstances, is void. 18 *Howard's S. C. Rep.*, p. 63.

If the owner be present in person or by agent, or be within easy access, the master has ordinarily no power, unless specially authorised to do any of the things above mentioned. *The schooner Tribune*, 3 Sumner, 144. It

is his duty to inform the owners of the ship and of the cargo, at his earliest opportunity, of any disaster interrupting the voyage; and, if circumstances will permit it, without unjustifiable delay, he should await their instructions, before adopting measures involving serious loss or heavy expenses. *Bryant v. Ins. Co.*, 13 Pick. R., 543; *Pike v. Balch*, 38 Maine R., 302.

The owners of a ship, insured in England, can abandon to the underwriters, on account of damage caused by a peril insured against, only where the ship, when recovered or repaired, will not be worth the expense necessarily incurred in recovering or repairing her. But ship-owners, insured in the United States, may abandon, on account of damage caused by a peril insured against, according to the decisions of the federal courts and most of the state courts, when the cost of repairs *without* any deduction of "one-third new for old," will exceed half the value of the ship, after she has been repaired at the place of repairs—in the absence of any stipulation in the policy to the contrary. According to the decisions of the state courts of Massachusetts and New York, the "one-third new for old" is to be *deducted* from the repairs, and the valuation in the policy, if there be one, is to be adopted in determining the right of abandonment. Consequently the repairs necessary to restore the vessel to a sound condition must amount to more than *seventy-five* per cent. of her valuation in the policy, when repaired (one third of which, twenty-five per cent., being cast off, leaves fifty per cent.), before there can be an abandonment, which insurers are bound to accept, and settle for as for a total loss. The

New York policies contain a provision that the valuation in the policy, if there be one, if not, then the actual value at the time of the inception of the risk, at the port to which the vessel belonged, shall be taken in determining the question of the right of abandonment. The New England policies contain a similar provision, and also stipulate for the deduction of "one-third new for old" in determining the same question.

If the ship be saved and complete the voyage by carrying forward the cargo, it is the duty of the master or ship-owner to cause a final apportionment or adjustment of the expenses that have been incurred for the general benefit, to be made at the port of delivery, without unnecessary delay. In *Dupont de Nemours v. Vance*, 19 Howard's S. C. Reps., 162, it was decided, "That when cargo is lawfully jettisoned, its owner has, by the maritime law, a lien on the vessel for its contributory share of the General Average compensation;" and, that the owner of the cargo may enforce payment thereof by a proper proceeding *in rem* against the vessel and against the residue of the cargo, if it have not been delivered." An unconditional delivery of the goods by the master to the consignee would be considered as a waiver of the lien, and it would be lost. *Rae v. Cutler*, 7 Howard, 729. But it is the duty of the master not to deliver, but to detain the goods, as well those belonging to the United States as those belonging to individuals, until the contribution toward the Average be either paid or secured. *Simonds v. White*, 2 Barn & Cress, 805; *Strong v. Firemen's Ins. Co.*, 11 Johns, 324; *The United States v. Wilder*, 3 Sumner, 308. The custom is, that

the master delivers the goods, and takes a bond from the consignee, conditioned to pay his contribution when the Average shall be adjusted. *Barnard v. Adams*, 10 Howard, 270; *Sturgis v. Cary*, 2 Curtis, 382. An adjustment of General Average, fairly made at the port of delivery according to the law of the place, is binding upon all parties and interests. *Peters v. Warren Ins. Co.*, 1 Story, 471; *Lewis v. Williams*, 1 Hall, N. Y. 430; *Simonds v. White*, 2 Barn. & Cress, 805.

CHAPTER IX.

CARRIAGE OF GOODS; EARNING AND PAYMENT OF FREIGHT &c.

The ship-owner undertakes and promises to carry in his ship the goods of the shipper to their destined port in safety (perils of the seas excepted), by the proper route, and in due season. This implies a promise that his ship is seaworthy in all respects, that it has a sufficient master and crew, who will take due care of the goods as to lading them on board, carrying and delivering them, and who will navigate the ship to her destined port in the usual way, without unnecessary delay or deviation. And if there be a failure in any of these particulars, and the goods be thereby injured or lessened in their value to their owner, the ship-owner is responsible, and the ship itself is subjected to the lien of the shipper of the goods, in order that he may enforce his rights, or obtain indemnity for a violation of them. On the other hand, if the goods be so carried, the owner of the goods is bound to pay to the owner of the ship the freight earned by the carriage, and the ship-owner has a lien on the goods to enforce his rights against them. And if the

goods be once laden on board, the ship-owner has a completed right to carry them the whole distance; nor can the shipper re-claim them and take them out of the ship, (unless by his consent) without paying to the owner either his full freight, or compensation for any trouble or loss sustained by him. 1 *Parsons' Mar. Law*, 122.

If goods be carried on deck without the consent of the shipper, and be lost by a peril of the seas, the owner will be responsible, although the bill of lading contained a clause excepting the liability of the owner for a loss by perils of the sea. For this exception does not lessen his obligation to carry the goods in the proper and customary manner. *The Rebecca*, Ware, 188; *The Waldo*, Davies, 161. But if no damage result from their being put on deck, the owner of the vessel will not be liable for injury happening to them from any other cause, and the shipper must pay freight. *Gardiner v. Smallwood*, 2 Hayw., N. C. 349; *Vernard v. Hudson*, 3 Sumner, 405.

It is universally conceded that the master of a carrier ship, on his arrival at the port of delivery, has a right to retain the goods until the freight be paid by the consignee. But in order to the exercise of this right, it is necessary not only that the goods should have arrived at the place of their destination, but they must be taken out of the vessel, and the master must be ready to deliver them on payment or tender of the freight. It is quite clear upon authority, that the unlivery of the cargo is, by the maritime law, a condition precedent to the perfect right to freight and the right to detain for non-payment; and the reason is that the merchant may

have an opportunity to examine the goods, before he makes himself liable at all events for the freight. 2 *Sumner's R.*, 589.

The master may detain any part of the merchandise for the freight of all that is consigned to the same person. Hence, if the master in such case make a delivery of part of the goods to the consignee, he may retain the residue even against a purchaser, until payment of the freight of the whole. But if the goods be sold to different persons by the consignee, and part be delivered, the master has not a lien upon the residue so as to compel one purchaser to pay freight for what has been delivered to another purchaser; but only for what has been purchased by himself.

This lien may be waived by consent; the stipulations in charter-parties often rendering it difficult to determine whether they be not inconsistent with the lien, for instance, if the delivery of the goods be by the charter-party to precede the payment or security of payment of freight, such a stipulation furnishes a clear dispensation with the lien for freight, for it is repugnant to it, and incompatible with it. On the other hand, where such payment or security of payment of freight, is to be simultaneous or concurrent with the delivery, then the lien exists in its full force, and may be insisted on. *The Volunteer*, 1 *Sumner's R.*, 551; *Chandler v. Belden*, 18 *Johns*, 157.

The shippers are bound to pay the full freight for the voyage, if the cargo be carried to the port of destination, and specifically remain, notwithstanding at its arrival it is, by reason of sea-damage, utterly ruined and

worthless. And after the shipment of the cargo on the voyage, the shippers have no right to demand it at any intermediate port, short of the port of destination, without full payment of freight for the voyage, whether the cargo arrive there in a damaged or undamaged state. The shipper or consignee cannot, by refusing to receive the goods at the port of destination, release the shipper from the payment of freight. *Jordan v. Warren Ins. Co.*, 1 Story's R., 342, 352; *The ship Nathaniel Hooper*, 3 Sumner's R., 554; *Caze v. The Baltimore Ins. Co.* 7 Cranch R., 358, 362; *Hunter v. The Union Ins. Co.*, 1 Wash. C. C. R., 530; *Hedfield v. Jameson*, 2 Mump., 53.

The ship owner is responsible only for the transportation of the cargo, the freight will be due on its delivery at the port of destination, and in whatever degree goods may be diminished in value by decay or damage from perils of the sea, and though they may be of no value on arrival at the port of destination. Still, if they be delivered *in specie*, being articles of the same kind as those shipped and not mere remains of its destruction or decay, freight is due; and accordingly, though the goods may be totally lost to all the purposes for which they can be available to the shipper, there is not a total loss of freight. *Hugg v. Augusta Ins. Co.*, 7 Howard's U. S. Sup. Ct. R., 595.

If freight be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid unless there be a special agreement to the contrary. But if the subsequent non-performance of the contract be occasioned by the neglect or

default of the party who has paid it; the money paid in advance is not recoverable back. *Watson v. Duykinck*, 3 Johns, 335; 1 Peters Adm. R. 207 note; *Detouches v. Peck*, 9 John's R., 210; *Griggs v. Austin*, 3 Pick., 20.

It is clear, from all the authorities ancient and modern, that if the ship be disabled in the course of the voyage and can be repaired in a reasonable time, and the cargo is not perishable, the master is not bound to tranship, but he may detain the cargo until the repairs be completed, and then prosecute his voyage and earn full freight. If however, the ship cannot be repaired at all, or not without very great loss of time, the master is at liberty to tranship, and so to earn the whole freight, and in such case the freighter is bound to pay the extra freight for the renewed voyage, which the master pays for the hire of the vessel which he procures; that is to say, the owner of the goods is not responsible for the old and the new freight united, but for the excess of the whole freight over what the old freight would have been, if the first ship had been able to carry on the goods. This subject has been fully considered under Chapter on the "Powers and Duties of the Master."

The general rule is, that no freight is due for goods which perish by the perils of the seas in the course of the voyage. In the case of *Frith v. Baker*, 2 John's R., 327, it appeared that fifty hogsheads of sugar were shipped on freight. They were properly stowed, but during the course of the voyage the ship leaked, owing to tempestuous weather, by means of which the sugar was washed out, and upon the arrival of the vessel at the

port of destination, the hogsheads were empty, and some of them fell to pieces. It was held that no freight was due. The sugar was as effectually destroyed as if it had at once been swept into the sea, and gone to the bottom. Bringing into port the empty hogsheads was not bringing the hogsheads of sugar, which the carrier had undertaken to do. The authorities all concur upon the point that no freight is due for casks leaked out by perils of the sea, as the subject matter of the contract no longer exists. But, if the commodity be lost by other causes than the perils of the sea, such as internal decay, leakage, evaporation and the like, the freight is due nevertheless. 2 John's R., 327; *Coffin v. Storer*, 5 Mass., 252. The owner of liquids or any articles shipped in casks of any description, is in the first instance chargeable with the duty of supplying proper casks, and would presumptively be responsible for a loss arising from their insufficiency or defect. The effect of an unqualified bill of lading is to transfer this presumptive responsibility to the captain and owners of the vessel. They therein acknowledge the good condition of the casks upon their reception on board, and engage to deliver them and their contents, as described, in the same condition. When the case presents nothing else, if the casks be delivered empty, or nearly so, and the actual cause of the leakage be unknown or conjectured, the owners of the vessel lose their freight. They have not performed their engagement. A portion of the freight would also be lost for any number of the casks delivered empty, as well as for any portion of their contents of any cask which had leaked out. The loss in these cases is legally attribut-

able to the defect of stowage, or some cause over which the master *had control*, and for which his contract makes him responsible. As, however, a bill of lading, treated as a receipt, is not conclusive, it is open to the ship-owner and master to prove explicitly that the casks were, in fact, unsound or badly made; and in such a case the original responsibility of the owner for their condition is restored, and he is bound to pay the freight. A bill of lading may be so qualified as to avoid any acknowledgment of the good order of the casks, or the nature of their contents. It may import only that these matters are so represented. In such a case the burthen is thrown upon the shipper to establish the truth of his statement—for example, upon a question of loss, to make the owner of the vessel responsible—and upon a question of freight, if the casks be delivered, it would be earned, whatever might be their condition or the condition of their contents. In either case explicit words should be used to do away with the obligations which the interests of commerce have rigorously imposed upon the masters and owners of vessels engaging to carry goods for hire.

The receipt of goods by a general ship under the usual bill of lading (by which it is expressed that they are to be delivered to the consignee or his assigns, he or they paying freight for them) is evidence of a contract, by the person so receiving them, to pay the freight due upon them. The assignee of a bill of lading claiming and receiving goods under it, is bound by the terms of it, not only as to the amount of freight but for the demurrage also, and there is a sufficient consideration arising

on the claim of the goods by him, from which the law will infer a promise by him to pay such demurrage as well as freight. If the master notify the person who receives the goods that he must take them, subject to the charge for freight, the person so receiving them becomes liable therefor. Or if, by the terms of the bill of lading, the goods be to be delivered to the consignee, or to his order, on payment of freight, the party receiving them, whether the consignee or an endorsee, to whom the bill of lading has been transferred by the consignee, makes himself responsible for the payment of freight. The law implies a promise on his part to pay the freight, such being the terms on which, by the bill of lading, the goods were to be delivered. The person who accepts and receives the property thereby makes himself a party to the contract. When the consignment therefore, is to A. or his order, and A. endorses the bill of lading, and orders a delivery to B. to whom accordingly the goods are delivered, B. becomes bound to pay the freight, and A. is discharged. *Trask v. Duval*, 4 Wash., C. C. R., 184. But whilst the liability of the consignee is admitted where he receives goods under a bill of lading, as above described, it does not follow that the consignor is exempt. There is no shifting of liability. The contract of the consignor and consignee is not considered to be inconsistent with each other; each is an original contract upon a sufficient consideration. *Grant v. Wood*, 1 N. J., 292; *Barker v. Havens*, 17 John's R., 234. In commercial transactions, nothing is more common than that there should be several persons, all of whom are liable for the same thing. And in this

country, the cases all proceed upon the principle that the clause in the bill of lading, "He (the consignee) paying freight," is introduced for the benefit of the carrier not of the consignor.

If the master during the course of the voyage be from necessity compelled to sell a part of the cargo to obtain provisions or repairs, the owners must pay to the merchant the price that the goods would have brought at the place of destination, consequently they are justly entitled to charge the merchant with the freight that would have been due, had the goods been conveyed thither. So too, if part of the cargo be thrown overboard for the necessary preservation of the ship and the remainder of the goods, and by that means the ship be preserved, and perform the voyage, the value of the part sacrificed is to be answered for to the merchant by way of General Average, and the value of freight thereof to the owner.

Charter-Party.

The usual stipulations on the part of the owner or master are, that the ship shall be tight and staunch, furnished with all necessaries for the intended voyage, ready by a day appointed to receive the cargo, and wait a certain number of days to take it on board; that, after loading, she shall sail with the first fair wind and opportunity to the destined port (the dangers of the seas excepted), and there deliver the goods to the merchant or his assigns, in the same condition they were received

on board ; and further, that during the course of the voyage, the ship shall be kept tight and staunch, and furnished with sufficient men and necessaries, to the best of the owner's endeavors.

Upon the delivery by the charterer of his goods on board the vessel, in pursuance of a charter-party of the nature above described, the master signs a bill of lading for them, as in the case of shipments on board a general ship, the design of a charter-party being to secure the charterer the exclusive right to the use of the ship to the extent and upon the terms stipulated, and the bill of lading being the evidence of the shipping of the particular merchandise to be conveyed in pursuance of the contract.

Although it is usual in a charter-party, for the owner to stipulate that the ship shall be kept tight, staunch and strong during the voyage ; he is also bound in the absence of such stipulation, to see that she is in a suitable condition to transport her cargo in safety, and to keep her in that condition, unless prevented by the sea or unavoidable accident. And if the goods be lost by reason of any defect in the vessel, the owner is answerable to the freighter upon the principle that he tacitly contracts that his vessel shall be fit for the use for which he thus employs her. *Putnam v. Wood*, 3 Mass., 481.

Where the vessel is chartered by the month, freight will not cease to accrue during the time exhausted in making repairs, if there be no neglect or unreasonable delay on the part of the owner, in having them made. *Spafford v. Dodge*, 14 Mass., 66 ; *Minot v. Durant*, 7

Mass. 438; *Havelock v. Geddes*, 10 East., 555.

If the whole vessel be chartered to take a cargo, at certain specified rates per ton, and the freighter do not furnish a full cargo, the owner of the vessel is entitled to freight, not only for the cargo actually put on board, but for what the vessel could have taken also, had a full cargo been furnished. *Duffie v. Hayes*, 15 John's R., 337; *Heckscher v. M' Crea*, 24 Wendell, 304.

The charterer may underlet the vessel, unless restrained by an express clause in the charter-party.

The charterer of a vessel is bound to victual and man her, without any express stipulation in the charter-party to that effect, unless it appear from the instrument itself that a different arrangement was intended. *Goodrich v. Lord*, 10 Mass., 483.

Where the general owner retains the possession, control and navigation of the ship, that is to say, where he supplies the necessaries for the voyage, and appoints the master and crew, the charter-party is a mere affreightment sounding in covenant, and the general owner remains owner for the voyage; but where the freighter hires the possession, control and navigation of the ship, agreeing to pay the master and crew, he becomes owner for the voyage, and the general owner has not the privileges and responsibilities of ownership, in respect to third persons for the voyage. *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch's R. 39.

If the ship be freighted for an entire lading, and the freighter do not furnish a full lading, the master has no right without the consent of the freighter, to take in other goods to complete the lading. The freighter is en-

titled to the full enjoyment of the ship, and is answerable to the owner for the stipulated price, whether he put on board a complete cargo or not.

If the merchant be not ready at the appointed time to load a cargo, the master is at liberty to seek another cargo, and has also his remedy for damages. Hence, if there be a charter-party, with a covenant to proceed to a foreign port, and take a cargo there on account of the charterer, and return therewith to a certain port for a stipulated hire, and the ship go to the foreign port, and the charterer decline to put any cargo on board, the owner of the ship may engage in another voyage and take another cargo on freight. He is not obliged to pursue a voyage whose whole objects are defeated, and look for recompense to the event of a suit for damages. The neglect or refusal of the charterer to furnish a cargo pursuant to the charter-party absolves the owner from a further prosecution of the voyage, if he so elect, and enables him rightfully to engage another cargo for another voyage. *Kleine v. Catara*, 2 Gallis' R., 61.

Where a certain number of lay-days are stipulated by the charter-party for unloading the cargo, the consignee is not bound to receive the goods as soon as the master is ready to deliver them ; he is entitled to the privilege of taking his own time, provided he do not exceed the number of lay-days, and the freight is not earned until actual delivery to the consignees. If besides the lay-days, a further period be allowed by a clause of demurrage, the master is bound to wait that period also if required to do so ; but after the full time of laying and

demurrage has elapsed, the master is not bound to wait for a cargo beyond that time, for the contract is terminated, and both parties are absolved from all further liability under it. If, however, the merchant or his authorised agent request the master to wait, after the stipulated time has expired, there is an implied contract that he will pay for the delay. *La Combe v. Waln*, 4 Binn, 299; *Robertson v. Bethune*, 3 Johns, 342.

Where a charterer stipulates to ship a full cargo, consisting of heavy and light goods, he is not obliged to load enough of the heavy goods to keep the ship in proper trim, but the ship-owner is bound to provide sufficient ballast. *Moorsom v. Page*, 4 Camp., 103. And where the charterer stipulated that one hundred tons of rice or sugar should be loaded first, in order to ballast the vessel, it was held, that after loading the one hundred tons, he was at liberty to complete the cargo with light goods, and if more ballast were needed, the owner was bound to supply it. *Irving v. Clegg*, 1 Bing., N. C., 53. If the charterer stipulate to furnish a sufficient quantity of goods to fill the vessel and to load her to a fair and reasonable draft, with enough of a certain kind, or its equivalent, for ballast, the charterer is not bound to provide such goods as the master demands, but if the latter can, with the goods furnished, stow the vessel in such a way as to fill and trim her properly, the obligation of the charterer is performed. *Rich v. Parrott*, U. S. D. C., Mass., 20 Law Reporter, 135.

Bill of Lading.

A Bill of Lading is an instrument usually signed by the master of a ship, but occasionally by some one authorised to act on his behalf, whereby he acknowledges the receipt of merchandise on board of his vessel, and engages, under certain conditions and with certain exceptions, to deliver the same at the port of destination in safety, either to the shipper, or to such person as may be designated by an assignment or order written thereon. It contains the quantity and marks of the goods, the names of the master, ship, shipper and consignee, the place of departure and destination of the cargo, and the stipulated amount of freight, together with allowances recognised by the customs at the port of delivery, and known as *primage* and *average*. Sometimes two, and sometimes three Bills of Lading are thus signed and delivered, of which the merchant commonly sends one or two to his agent, factor or other person to whom the goods are to be delivered at the place of destination; that is, one on board the ship with the goods, another by the post or other conveyance, and one he retains for his own security. It is desirable that the master should have another for his own use.

The word *primage* denotes a small payment to the master for his care and trouble, which he is to receive to his own use, unless he have otherwise agreed with his owners.

The word *average* in this place denotes a claim reserved against the receiver of the goods and which is divided *pro rata* between the owners of the ship and the

proprietors of the cargo, for small items of expense, such as towing, pilotage &c., when incurred for the general benefit.

The master should be careful not to permit the insertion of statements, in the Bill of Lading. at variance with the fact, for, by so doing, he may bind his owners and become himself responsible to them, and to other parties. In *Hastings v. Pepper*, 11 Pick., 43, Mr. C. J. *Shaw* said, "It may be taken to be perfectly well established, that the signing of a Bill of Lading acknowledging to have received the goods in question, in good order and well conditioned, is *prima facie* evidence, that as to all circumstances, which were open to investigation and visible, the goods were in good order; but it does not preclude the carrier from showing, in case of loss or damage, that the loss proceeded from some cause which existed, but was not apparent, when he received the goods, and which, if shown satisfactorily, will discharge the carrier from liability. But in case of such loss or damage, the presumption of law is, that it was occasioned by the act or default of the carrier, and of course the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible." Where by the bill of lading, the goods are to be delivered in good order, the dangers of the seas excepted, and they are found to be damaged, the burden of proof is on the ship-owner to show that the injury was caused by one of the excepted causes. *Clark v. Barnwell*, 12 Howard, 272.

If there be a clean bill of lading, that is, if it be silent as to the mode of stowing the goods, and contain no

exceptions to the master's liability, but the usual one of the dangers of the seas, or if there be a charter-party in the like form, the law presumes that the goods are to be carried under deck. The usual and only safe mode of carrying goods, is under deck, and when the contract is entered into, it is presumed to be the intention of the parties that the goods shall be stowed and carried in the usual way, unless there be a special agreement to the contrary. This is a condition that is silently understood by the parties and implied by the law. A Bill of Lading, therefore imports, unless the contrary appear on its face, that the goods are to be safely secured under deck. And no usage can be permitted to control, vary or contradict this meaning. *The Waldo*, Davies' R., 160; *Vernard v. Hudson*, 3 Sumner's R., 405.

Bills of Lading are transferable by endorsement, and may thus pass the interest and title in the property. *Conard v. The Atlantic Ins. Co.*,¹ Peters' R., 445. Strictly speaking, no person but the consignee can, by any endorsement on the Bill of Lading, pass the legal title to the goods. But if the shipper be the owner, and the shipment be on his own account and risk, although he may not pass the title by virtue of a mere endorsement of the Bill of Lading, unless he be the consignee, or the goods be delivered to his order; yet by assignment on the Bill of Lading, or by a separate instrument, he can pass the legal title in the same; and it will be good against all persons except purchasers, for a valuable consideration, without notice, by endorsement on the Bill itself. Such an assignment by the owner passes the legal title against his agents or factors and credi-

tors, in favor of the assignee. *Conard v. Atlantic Ins. Co.*, 1 Peters' R., 445; *Stubbs v. Lund*, 7 Mass., 453; *Ilseley v. Stubbs*, 9 Mass., 65; *Walter v. Rose*, 2 Wash. C. C. R., 283; *Stanton v. Eager*, 16 Pick., 473.

The assignee of a Bill of Lading, claiming and receiving goods under it, is bound by the terms of it, not only as to the amount of freight but also for the demurrage, and there is a sufficient consideration arising on the claim of the goods by him, from which the law will infer a promise by him to pay such demurrage, as well as freight.

The Bills of Lading are evidence against the master or the owner of the ship, not only as to the reception of the merchandise, but as to any material fact stated in them respecting the quantity or quality, or any other element in the description of the goods. It is therefore usual, when there is the least reason to suspect the quantity is not right, or that there is any damage in the goods, to write in the Bill of Lading :

If Hemp, Flax, bars of Iron &c.,

“Quantity and conditions unknown; and three bundles of hemp in dispute; if on board, to be delivered.”

If Linen, Yarn, Bales, Hardware &c.,

“Insides and contents unknown to.”

If Tar, Wines, Brandy, Turpentine, Flour &c.,

“Contents and conditions unknown; not to be accountable for leakage; and it is agreed that the freight shall be paid for the quantity shipped.”

GOODS CARRIED ON DECK.

When any goods are to be carried on deck, it should be expressed in the Bill of Lading.

If articles be of a perishable nature,

“Not to be accountable for loss by natural decay of the articles; and freight to be paid for the articles shipped.”

In *Clark v. Barnard*, 12 Howard, 272, the Bill of Lading contained the usual clause that the boxes containing the goods were shipped in good order, “contents unknown.” The court said: “It is obvious, therefore, that the acknowledgment of the master as to the condition of the goods when received on board extended only to the external condition of the cases, excluding any implication as to the quantity or quality of the article, condition of it at the time received on board, or whether properly packed or not, in the boxes.” See also, *Vernard v. Hudson*, 3 Sumner, 405. But even if the Bill of Lading do not contain these words, evidence is admissible to show that the goods were damaged at the time they were received by the carrier, though such damage were not apparent. *The Colombo*, U. S. C. C., N. York, 19 Law Reporter, 376.

The master is bound to deliver, and the shipper is bound to pay; nor can the master demand his freight, without being ready to deliver the goods on payment of it, nor can the shipper demand his goods without a tender of the freight. The usual clause in the Bill of Lading, that the goods are to be delivered on payment of freight shows that these two acts are concurrent, and

that neither party can sue on the contract without an offer to perform his part of it. Thus in *Lane v. Penniman*, 4 Mass., 91, *Parsons*, C. J., says; "Although the master may retain the cargo until the freight be paid or tendered, yet he must be ready to deliver the cargo on payment of tender. But if the bargain be that freight shall be paid in so many days after arrival and delivery of the goods, this is held to mean that the goods are to be delivered first, and at a future day the freight is to be paid.

DELIVERY OF THE GOODS.

The general rule applicable to carriers and other persons contracting to deliver goods, is that a personal delivery is necessary. But this rule does not apply to the case of ships, the usages of trade having constituted a delivery on the wharf with notice to the consignee sufficient. The delivery must be on a wharf which is suitable for the cargo which is to be placed upon it; if the goods be injured in consequence of the insufficiency of the wharf, the vessel is liable as if no delivery had taken place. *The bark Majestic*, U. S. D. C., N. York, 10 Legal Observer, 100. In this case a cargo of iron was unloaded on a pile dock, the master having notice that it was not strong enough to sustain it, and the vessel was held liable for the injury sustained, by the wharf breaking through. And although the liability of the carrier may cease by the goods being put on the wharf, yet if they be taken on board again his liability revives. *The Huntress*, Davies, 82.

The goods must not be piled on the wharf promiscu-

ously with those of other consignees, but the master must, as far as possible, separate the different consignments, so as to render them accessible to their respective owners. *The ship Middlesex*, U. S. C. C., Mass., May term, 1857, Law Reporter, 14. In all cases the master is required to give notice to the consignee of the arrival of the vessel, and of his readiness to discharge cargo; and knowledge, therefore, casually acquired that the vessel has arrived and will discharge her cargo at a particular wharf, is not enough. *Golden v. Manning*, 3 Wilson, 429; *The ship Middlesex*, 21 Law Reporter, 14. After the goods are on the wharf the consignee has a reasonable time in which to inspect them, and determine whether or not he will accept the consignment. Till he do accept, he is not liable for freight. If he refuse to accept he incurs no liability, and the master cannot leave the goods to perish, but is bound to store them for the owner. *Arthur v. schooner Cassius*, 2 Story, 81; *Ostrander v. Brown*, 15 Johns, 39; *Chickering v. Fowler*, 4 Pick., 371. The delivery must be on a proper day as regards the weather, and must also be on a business day, and at a proper hour of such day; and a clerk or truckman in the employment of the consignee has no authority to bind the latter to receive the goods at an unusual time; and the liability of the vessel continues till the consignee has had that reasonable time to examine the goods to determine whether he will accept them or not as spoken of above. In general, the delivery must be *reasonable*, in time, place and circumstance. *Price v. Powell*, 3 Comst, 322, which was an action brought by the consignor, it was held, that the

liability of the carrier continued until the consignee had had a reasonable time, in which to take away the goods. Notice was given late in the evening, and it was held that the consignee was not obliged to take away the goods before the next day, and that if they were injured in the night while on the wharf, the carrier was liable. So in *Segura v. Reed*, 3 La. Ann, 695, which was also an action by the consignor, after the delivery on the levee, and notice to the consignees, some of the goods were stolen. The court said : "The contract of the vessel is to deliver the goods to the consignee, and the responsibility continues until there be an actual delivery, or some act which is equivalent to or a substitute for it. Even assuming the general rule to be, that putting the goods on the wharf discharges the vessel, where there has been a notice to the consignees of the time and place of delivery, it seems to us that this rule is not to be applied with such rigor against the consignee as to put the goods unqualifiedly at his risk from the very instant of landing them, when he has made repeated calls for them during the day, and the discharge is not made until an advanced hour of the day." The consignee in this case received notice between twelve and one o'clock on Saturday, and went himself, and sent his clerk at three, to receive the cotton. It was not then delivered, and nothing was said in regard to the time when it would be delivered. It was put on the levee at four o'clock on that day. On Monday ten bales were missing. The carrier was held liable.

It has been held that a usage to deliver goods with-

out notice may be shown. *Gibson v. Culver*, 4 Wend, 305. Whatever the law may be in regard to a usage, it is clear that the parties may make a special contract in regard to the manner of delivery. *The Grafton*, Olcott Adm, 43.

A question of some difficulty has arisen, whether the contract of the ship-owner or master be so far an entirety that their liability continues till the whole consignment be out of the ship and ready for delivery. The better opinion seems to be, that if the consignee were notified that a part was ready for delivery, he would be obliged to take that part, and could not recover if, before all the goods were out, some were burned or otherwise destroyed or injured, on the wharf. 1 *Parsons' Mar. Law*, 157. The question came before Mr. Justice *Sprague*, in the case of *Paine v. Bowker*, U. S. D. C., Mass., 1856. Three hundred and forty-nine barrels of flour were consigned to a firm in Boston. On the twenty-sixth of the month the consignees were notified that the ship would unload that day, and the greater portion of the flour was landed on the wharf. The next morning twelve more barrels were landed. In the afternoon every thing on the wharf was destroyed by fire. All the flour, with the exception of three barrels which were afterwards tendered to the consignee, but not accepted, was on the wharf at the time of the fire. It was contended that the consignee was not bound to take away any of the barrels, till the whole was delivered, but the court decided otherwise, and held, that the ship had earned her freight.

The present usage in Boston as to the delivery of car-

go, was stated by *Lowell*, J. U. S. D. C., Mass, October term, 1866, in the case of *The brig E. H. Tuttle, Daniel N. Spooner, Treasurer of the Great Falls Manuf'g. Co., Libellant*. The libel was for damages alleged to have been occasioned by a refusal of the master of the brig to land the libellant's goods at East Boston. The libellant's agents at New Orleans shipped cotton to him at Boston, under the ordinary bill of lading. The brig arrived in the harbor on a Saturday night, and on Sunday her agents at Boston sent an order to the master to haul to Union wharf, which he did early on Monday. Soon after he had made fast, and discharged his tug-boat, he received an order from the libellant to haul to Grand Junction wharf at East Boston, which he refused to do. Some negotiation was had on that day and the next, between the libellants and the agents of the vessel; but the cotton was eventually landed at Union wharf, and was received by the consignee without any waiver of his rights, and he brought suit to recover as damages, the expenses of trucking his goods, which was equal to about one-third the amount of his freight. The libellant owned the greater part in bulk and value of the whole cargo, and was to pay the major part of the whole freight; but there were several other consignments of cotton, tobacco and hides to several persons. *Lowell*, J. said "This case has been carefully presented in evidence and argument. The question is, what are the respective rights and duties of the carrier and the consignees as to the wharf at which goods shall be landed by a general ship? The *dicta* of Mr. Justice Buller, and the other judges

in *Hyde v. Trent and Mersey Navigation Company*, 5 G. R., 389, 397, are cited in all succeeding books, as the foundation of the law upon this subject. 'A ship,' says Judge Buller, 'trading from one port to another, has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier.' When the case came up for adjudication in England, it was decided in the Common Pleas, the Exchequer Chamber and the House of Lords, that the carrier is bound to deliver to the consignee; and, if he intend to rely on a substituted delivery, he must plead that his delivery was according to the practice and custom usually observed in the port or place of delivery. *Gatliffe v. Bourne*, 4 Bing. (N. C.) 314, 3 M. & G., 641, 7 M. & G., 850. And so is the weight of modern authority. *Abbott on Shipping* (8 Eng. Ed.), 378. *Humphreys v. Reed*, 6 Whart., 435; *Ostrander v. Brown*, 15 Johns, 39; *Hemphill v. Chenie*, 6 Watts & S., 62; *Wardell v. Mourilian*, 2 Esp. R. 693. *Angell on Carriers*, §298 *et seq.* It has been recognised as the usage of Boston and other ports, for the master of a general ship to go to a suitable wharf, and notify the consignees, who take their goods from the wharf. *The Tangier*, 21 Law. Rep. 8; *Cope v. Cordova*, 1 Rawle, 203. So that the general rule is now settled, that such a delivery is sufficient. But the precise point in this case, namely, what is the usual wharf, and who is to point it out, was not directly involved in these or any other decision, that I have seen. The libellant offers evidence to show, that, by the usage of Boston, the consignees

have the right to order the master to go to any commodious or suitable wharf, and his witnesses concede, that, excepting in some particular trades not now involved, if no such order be given, he may choose for himself. This concession avoids the effect of a considerable part of the claimant's evidence, which showed, as do some of the decisions incidentally, that the master of a general ship, with an assorted cargo for several consignees, does not usually, and cannot conveniently, stop to collect the votes of his consignees before proceeding to haul in. It appeared in evidence that there are many cases, as where the cargo is heavy or perishable, in which it is of the greatest consequence to the consignees whether their goods be landed at one place or another ; and, that, generally speaking, it is a matter of no proper concern to the master. It appears that masters are in the habit of going to the wharf at which the best terms are offered in 'return wharfage,' as it is called ; but, as the cargo pays the wharfage, any commission or per centage on its amount ought to belong to the owners of the cargo ; and no court could allow this to be a valid reason for giving the choice of place to the master. A single consignee of a heavy cargo coming coastwise may find his cartage equal in amount to his whole freight. Take a cargo of iron rails, ordered by a rail way company that has its wharf and track at the north end of the town, is it reasonable that the master should, for the sake of a petty per centage on what the company itself pays, land the cargo at South Boston, where ships may be scarce, and return wharfage high, against the known wish of the owners of the goods ? This statement of the interest of

the parties of itself exhibits their rights, at least where there is but one consignee, or where the consignees are unanimous; for it may safely be laid down as a proposition of law, that, as between two points within the port equally convenient for the carrier, he must deliver at the most convenient for the consignee, if duly apprised of the facts. It would be for the carrier to show a usage to the contrary, and then to establish its reasonableness. In the case of one consignee of the whole cargo, having his place of business at the port, and readily accessible, it might be worthy of serious consideration, if the case were not now before us, whether the master must not consult with him at all events. Where there are several consignees, the case is different. The master cannot conveniently consult them, and is not bound to do so. Here the evidence shows the course of trade to be, that the majority, that is, those who together pay more than half the freight, have the right to choose the wharf. This is reasonable, because it is of no special moment to the minority whether the master or the majority choose a suitable wharf; and it is as convenient and just a mode of ascertaining the majority as any other. The merchants appear to be unanimous about it. It being shown, however, that, in case of a general ship, this right is often unimportant, and is waived, and is presumed to be waived unless notice be given; and this whether one person alone, or several together, constitute the majority, the consignees ought to be careful to give their notice in due season. The vessel had her agent in Boston, who, in good faith, engaged the berth at Union wharf, and the vessel was hauled in, and

made fast, and her tug was discharged. I cannot tell what inconvenience and damage might result to a ship in changing her berth after that period. The libellant should have found the agent or the master earlier. It is not reasonable to expect them to change their arrangements after they have gone so far. What is seasonable notice will depend on the facts of each case. Here it was too late. It is to be understood that the usage was not alleged to apply where any peculiar and important inconvenience to the ship would be promoted by her going to a particular wharf. No point of that sort was in controversy."

CHAPTER X.

EARNING AND PAYMENT OF WAGES.

In case of Shipwreck.—That seamen are entitled to their wages, or a compensation equivalent to their wages, by way of salvage, in case they do their duty and sufficient be saved from the wreck for that purpose, was decided many years ago by the American courts, and seems now fully established.

It was so held by Judge *Winchester*, in a case cited in 1 Peters' Adm., 186, note ; and by Judge *Peters*, in *Giles v. The Cynthia*, 2 Peter's, 203 ; *Weeks v. The Catharine Maria*, Ibid, 424 ; *Taylor v. The Cato*, 1 Peters' Adm., 48, 58.

All the authorities of the Maritime law agree that, in cases of wreck, where parts of the ship are saved, by the exertions of the seamen, they have a lien on what is thus saved for some kind and extent of compensation. The doubt in these cases has been, whether it was to be a compensation in the nature of salvage for their exertions in saving the property and to be confined to that, or whether the case of shipwreck constituted a special

exception to the rule that freight must have been earned, to entitle to wages, and thus preserved the lien for the whole wages antecedently earned, with perhaps an additional compensation in the nature of salvage. The authorities bearing upon this question are not very clear.

The Supreme Court of Massachusetts and that of New York, have inclined to treat the lien as arising by way of salvage. *Frothingham v. Prince*, 3 Mass. R., 568; *Coffin v. Storer*, 5 Mass. R., 252; 2 Davies' Abridg., 462; In *Dumett v. Tomhaghen*, 3 Johns' R., 154, where a ship was abandoned at sea as a wreck, on her homeward voyage, and some part of her cargo was saved by the ship's crew in the boat, the court held, that no wages were due for that part of the voyage, though the seamen might have an equitable lien on the goods saved for a compensation, in the nature of salvage.

In the District Court of Maine, Judge *Ware* has recognised the doctrine that the wreck is pledged by the maritime law for the payment of wages; but he holds that the seamen are not entitled, if the materials be saved by other persons; that the original contract by which the seaman is bound to the vessel, is not dissolved by the shipwreck, as long as the seamen remain by it, but that it is dissolved if they abandon it. *Lewis v. The Elizabeth & Jane*, Ware's R., 41.

In the Circuit Court of the District of Massachusetts, the allowance was put upon the ground of salvage, adopting the wages earned as a measure, in ordinary cases, leaving an additional recompense to be made for cases of extraordinary merit. *The Two Catharines*, 2 Mason's R., 319; see also, *The Saratoga*, 2 Gallis' R. 164, 183.

In the case of *Pitman v. Hooper*, 3 Sumner's R., 50, Judge *Story* remarks: "In the case of shipwreck during the voyage, the seamen, if they remain by the ship and assist in the salvage, will be entitled to receive their wages out of the proceeds of the wreck, if enough be saved to pay them, even though the entire freight be lost by the total destruction and loss of the cargo. This exception is, doubtless, designed to enlist the zeal and exertions of the seamen in the preservation of the property, as far as possible; and it is founded upon the same policy as the general rule; that is to say, to make it their interest to use every endeavor to save the property and to promote the success of the voyage. Whether this exception be to be expounded upon the ground of its being an allowance to the seamen in the nature of salvage, or whether it be a mere dry exception to enforce the public policy of the original rule, has been a topic of some judicial discussion. But whether it stand upon the one ground or the other, it is an exception now firmly established. What I rely on, in regard to this exception is, that it establishes a case in which, though the entire freight be lost, the seamen recover their full wages out of the wreck of the ship, without any deduction *pro rata* on account of the value of the materials of the ship, which have perished. The entire wages constitute in this case, a privileged lien, to be first paid; and the owner must submit to the entire loss, without any contribution towards his own loss."

In the case of *Jones v. The wreck of the Massasoit*, 7 Law Rep., 522, Judge *Sprague* remarks, that to allow mariners, in case of shipwreck to claim as salvors,

“ would not only be inconsistent with the contract of hiring, but a startling violation of that principle of maritime policy, which sedulously endeavors to bind up the interest of the mariner with that of the owner. It would be not only an inducement to relax his efforts in time of difficulty and danger, but a direct temptation to cause shipwreck and disaster that he might successfully claim the large rewards of salvage service.” See *The Rebecca*, 2 W. Rob, 122. There may, however, be extraordinary cases in which seamen may become salvors of their own vessel, as stated by Lord *Stowell*, in *The Neptune*, 1 Hagg. Adm., 227, 237; and by Mr. Justice *Story*, more liberally in the *Two Catharines*, 2 Mason, 219; and as in *The Blaireau*, 2 Cranch., 240, 269, 270.

Judge *Marvin*, in his valuable work on Wreck and Salvage, §149, says, “ Whether a seaman can ever become a salvor for services rendered to his ship or to the cargo, in any extremity of distress or danger, is a question upon which great Judges have differed. I shall not enter into the discussion of the question, but will state, as briefly as I can, what appears to me to be the result of the weight of authorities on the subject. The policy of the marine law binds up the interest of the seamen with the safety of the ship. Hence the maxims, ‘ Freight is the mother of wages,’ and ‘ The safety of the ship is the mother of freight.’ The same policy has, however, dictated exceptions to these maxims. Shipwreck does not discharge the crew from the obligations of their contract, but they are bound by the nature of their engagements, in their character of seamen, to

obey the master's orders, and to remain by the ship or wreck, afloat or ashore, as long as there is a reasonable hope of saving any thing without too much hazard of life, and to exert themselves to the utmost to save the ship or its materials and cargo. If they refuse to do their duty, on such an occasion, they forfeit their wages. If they save or assist to save the materials or cargo, or are ready and willing to assist and be prevented by sickness or other just cause, or by the master or owner, without their fault, they have a lien upon, and are entitled to be paid their wages, antecedently and concurrently earned, out of, all the materials so saved and out of the freight. Their lien upon these and every part of them attaches as a privileged hypothecation *tota in toto et tota in quilibet parte*, or, as it has been emphatically expressed, 'to the last plank of the ship and the last payment of the freight', and this by virtue of their original contract and their performance under it. If the ship be lost and no materials be saved, or not enough to pay their full wages, and they save the cargo or any part of it, and yet no freight be earned in consequence of the non-delivery of the cargo, or, if earned, be insufficient to pay their full wages; they are entitled to be paid, not wages, *eo nomine*, accruing for antecedent services (for the cargo is not liable for wages except *quoad* the freight due upon it), but a reasonable compensation *pro opere et labore*, in the nature of salvage for their services in saving the cargo—to be paid out of the cargo so saved by them. But they cannot entitle themselves to a salvage reward for any services they may render the ship or cargo within the line of their duty, however per-

ilous or severe the labor, while their connection with the ship continues.”

In the case of *The Dawn*, 26 Amer. Jur., 216 S. C., Davies' Rep., 121, it was held, that in case of shipwreck, the seamen are, by the maritime law, bound to remain by the vessel, and exert themselves to save all that is possible of the ship and cargo. When they do this, they are entitled to full wages, without deduction, against the material which they save of the ship, if enough be saved to pay them. And they are entitled to a further reward, in the nature of salvage, against the whole mass of property saved. Their claim is not as general or volunteer salvors, nor are they entitled to an equally large salvage; but they are entitled to a reasonable allowance, *pro opere et labore*, according to the circumstances of the case and the merits of their services. When the disaster happens in foreign ports, this ought not to be less than the expenses of their return home.

Where the vessel is wrecked on her outward voyage. If the ship and cargo be *entirely* lost on the outward voyage, so that no freight be earned, the seamen are not entitled to any wages. In such case, however, the advance wages are not to be returned. 4 *Mason*, 102; 3 *Sumner's R.*, 286.

Where the vessel is wrecked on her homeward voyage. If the ship and cargo be *entirely* lost on the homeward voyage, so that no freight on the return cargo be earned, the seamen are entitled to wages up to the time of the ship's arrival at the port of delivery or destination on the outward voyage, and for one-half the

time she lies there; for one-half the time during which the vessel is lying in port is deemed to belong to the outward voyage, and the other half to the homeward voyage. 3 *Sumner's R.*, 286; 1 *Peters' Adm. R.*, 215; 1 *Peters' C. C. R.*, 182.

If, in such case, the vessel had performed her outward voyage in ballast, and thus not earned any freight, the seamen would still be entitled to their wages for the outward voyage, and half the time she lay in port. 2 *Mason*, 331.

Where the vessel is wrecked between intermediate ports.—Where a vessel stops at several ports on her voyage for the purpose of receiving or delivering goods, as is usually the case in trading voyages, and the vessel and cargo are lost between the intermediate ports, the rule is that the seamen are entitled to wages up to the last port of discharge or receipt of cargo, before the loss of the vessel, and for half the time the ship lies there. *Johnson v. The Waterstorff*, 1 *Peters' Adm. R.*, 215; *Galloway v. Morris*, 3 *Yeates*, 445; *Thompson v. Fawsett*, 1 *Peters, C. C. R.* 182; *Lindsay v. The South Carolina*, *Rees' Adm. R.*, 173.

Where part of the freight has been earned, though the vessel be wrecked.—If, in case of shipwreck, or loss from any other cause, a part of the cargo be saved, and carried to the port of destination, so that part of the freight be earned, or if, from any cause, some portion of the freight money be saved, the sailors are entitled to full wages,

provided sufficient freight have been earned to pay them, or if it be not sufficient, then to the extent of the freight earned. 3 Sumner's R., 69. Thus, if the ship should become a total wreck on the outward voyage, yet if, by reason of a portion of the cargo being saved, or from any other cause, the owners should become entitled to some portion of the freight, the sailors have a right to be paid out of the freight earned, if sufficient, their full wages for the outward voyage.

Where a part of the wreck is saved.—In cases of shipwreck, seamen are entitled to full wages, when, *by their exertions*, remnants of the wreck to the amount of their wages are saved, although no freight be earned. If the wreck will not bring enough to pay full wages, then the seamen are entitled to wages to the extent of the value of the wreck. In order to entitle seamen to wages from the proceeds of the wreck, it must, as we have elsewhere seen, have been saved by their exertions; if, therefore, they abandon the wreck, and leave it without hope of recovery, or without an intention of returning, and it be afterwards picked up and saved, the seamen cannot claim to have their wages paid out of it, but must lose them. *Lewis v. The Elizabeth and Jane*, Ware's R. 41.

If, however, after a vessel is cast ashore, the owner come with a gang of hands and take charge of the wreck, and do not ask the aid of the sailors, they being willing to render it, they may recover their wages in an action against the remnants of the vessel.

Where freight is not earned in consequence of the acts of the owner or master. That circumstance does not deprive the mariner of his wages. A condemnation for illegal trading, in which the mariners are not implicated, does not work a forfeiture of their wages nor bar them of their action against the owners. *The Malta*, 2 Hagg. Adm. R., 158.

Where a vessel is sent out upon a seeking voyage in search of freight, and obtains none. The seamen are entitled to their wages. And if she arrive home in safety, the seamen, by their contract, have a lien on the vessel, and may proceed *in rem*. *Lady Durham*, 3 Hagg. Adm. R., 196. So too, if the ship perform her voyage without the owner having furnished any cargo, or if there be a special contract between the owner and freighter. *Pitman v. Hooper*, 3 Sumner's R., 286. The settled doctrine is, that seamen are entitled to wages, for the full period of their employment in the ship's service for any particular voyage, in which freight is or might be earned by the owner.

Where the voyage is broken up after it has been commenced, at any intermediate port, by the voluntary act of the master or owner. If, after the hiring of the seamen, the owners of the ship abandon the intended voyage, or if it be broken up from any cause not arising from the fault or misconduct of the crew, they are entitled to receive wages in the nature of damages, the amount being discretionary and controlled by the circumstances of the particular case. If the voyage be broken up after it

has been commenced, by the voluntary act of the master or owner, or by their default, wages are due for the whole voyage. *Wolf v. The brig Ober*, 2 Peters' Adm. R., 261.

Wages, how affected by the capture of the ship. The capture of a merchant ship does not itself operate, as a dissolution of the contract for mariner's wages, but at most a suspension only, of the contract. If the ship be restored and perform her voyage, the contract is revived, and the mariner becomes entitled to his wages; that is, to his full wages for the whole voyage, if he have remained on board and done his duty, or if, being taken out, he have been unable, without any fault of his own, to rejoin the ship. If the ship be condemned by sentence of condemnation, then the contract is dissolved, and the seamen are discharged from any further duty on board; and they lose their wages, unless there be a subsequent restitution of the property, or of its equivalent value, upon an appeal, or by treaty, with an allowance of freight, in which event the claim for wages revives. In the case of a restitution in value, the proceeds represent the ship and freight, and are a substitute therefor. If freight be decreed or allowed for the whole voyage, then the mariners are entitled to full wages for the whole voyage; for the decree of freight, in such a case, includes an allowance of the full wages, and, consequently, creates a trust or lien to that extent thereon, for the benefit of the mariners. If the freight decreed or allowed be for a part of the voyage only, the seamen are ordinarily entitled to wages up to the time for which the

freight is given, unless under special circumstances; as where they have remained by the ship, at the special request of the master, to preserve and protect the property for the benefit of all concerned. *Brown v. Lull*, 2 Sumner's R., 443; *Spafford v. Dodge*, 14 Mass. 66.

If a ship on her *outward* voyage be seized and carried into any port out of the course of her voyage, and be afterwards restored to the master, and arrive safely at her port of delivery, the seamen are entitled to receive their wages for the whole time of such detention, although the ship be lost on the return voyage. *Hooper v. Perley*, 11 Mass., 545.

If a ship be detained in like manner on her *homeward* voyage, and be afterwards lost, the seamen lose their wages for the time of such detention as well as for all the other time consumed on the homeward voyage. *Hooper v. Perley*, 11 Mass. R., 545.

Wages, how affected by the sickness of the seamen during the voyage. If a seaman become sick, or disabled during the voyage, so as to be unable to perform his voyage, and not from his own criminality or fault, he is entitled to full wages during the continuance of the disability, the same as if he were able to render service. *The ship Hazard*, Bee's Adm. R., 441.

But if a seaman contract for a particular service or duty on board a vessel, and it turn out that he has not the capacity to fulfil his engagement, or from want of knowledge, or health, or fidelity, he imperfectly perform it, the master may, in the one case, deny wages altogether, and in the other make a reasonable deduc-

tion according to the circumstances. And where from want of capacity or fidelity, the seaman is disqualified for the service he has stipulated to perform, the master will be justified in putting him upon a different duty. *Atkyns v. Burrows*, 1 Peters' Adm. R., 247; *Sherwood v. McIntosh*, Ware's R., 109.

Wages, how affected by death during the voyage. The point as to the right of wages, where the seaman dies during the voyage, has been several times decided. It has been invariably admitted, that the wages were due and payable up to the death of the seaman. But whether the wages were due for the whole voyage, has been a vexed question, upon which learned Judges have greatly differed in opinion. Judge *Peters* in the District Court of Pennsylvania, held in several cases that the wages were due to the end of the voyage, as if the mariner had lived and performed his duty. *Walton v. The Neptune*, 1 Peters' Adm. R., 142; *Scott v. The Greenwich*, Ibid, 155; *Jackson v. Sims*, Ibid, 157. One of these decisions was affirmed by Mr. Justice *Washington*, on appeal. *Jackson v. Sims*, 1 Wash. C. C. R., 441. Both of these learned judges relied much on the *seventh* article of the laws of Oleron, which they understood to import full wages for the entire voyage. On the other hand, in the District Court of South Carolina, Judge *Bee* afterwards held that wages were due to the time of the death only, and that such had always been the received practice of that District. *Cary v. The Kitty*, Bee's R., 255. Judge *Davis* followed in the decision already cited, and on a full and critical examination of

the ancient ordinances, and particularly of the article in the laws of Oleron, held that the wages could not be recovered beyond the death, and that the usage in Massachusetts had always been so. *Natterstrom v. The Hazard*, Bee's Adm. R., 441.

Where a person ships as an able-bodied seaman, when in fact he has a fatal disease, of which he dies after the vessel sails, no wages are allowed. 2 Peters' Adm., 263.

In case a seaman die in a foreign hospital, or on shore or elsewhere than on board the vessel, the wages, money and effects, if not already deposited, must be delivered up to the consul, or commercial agent, nearest to the place where such death occurs.

Wages, how affected when a seaman is wrongfully discharged. If a master, in violation of his contract, discharge a seaman from the ship during a voyage, the seaman will be entitled to a compensation for the injury according to the circumstances of his own peculiar case. This is ordinarily measured by the loss of time and the expenses of his return to the country where he was originally shipped. In some cases, wages have been allowed up to the prosperous termination of the voyage, and in others, up to the time of the seaman's return to the country where he was originally shipped, without reference to the termination of the voyage. If the seaman have obtained employment in the mean time, his earnings are deducted, not from his wages, but from the expenses of his return. If the master detain the clothing of the seaman, the value of it may be recovered in

the same libel. *Emerson v. Howland*, 1 Mason's R., 45; *Hutchinson v. Coombs*, Ware's R., 65; *The Gloucester*, 2 Peters' Adm. R., 403.

Wages, how affected when seamen are discharged abroad with their own consent, or the ship is sold.—The seaman, would, of course, be entitled to wages up to the time of such discharge; and, in addition to this, it is provided by the Act of Congress of 28th Feb., 1803, ch. 62, that when an American seaman is discharged in a foreign country, with his own consent, it shall be the duty of the master to produce to the consul, or commercial agent, the certified list of his ship's company, and to pay to such consul, or commercial agent, three months' pay over and above the wages which may then be due to the seaman. Two of these three months' extra wages are to be paid to the discharged seaman by the consul, upon his engagement on board of any vessel to return to the United States; the other month's wages to be retained by the consul for the purpose of creating a fund for the payment of the passages of seamen belonging to the United States, who may be desirous of returning home, and for the maintenance of American seamen who may be destitute in such foreign port.

This Act has been altered somewhat by the subsequent Act of Congress of 1840, ch. 48, which authorises any consul of the United States, or if there be none residing at the foreign port, then any commercial agent authorised to perform such duties, upon the application of both the master and any seaman of the vessel, to dis-

charge the seaman, if he think it expedient, without requiring the payment of three months' wages, or of any extra wages; and he may discharge him upon such terms as will, in his judgment, save the United States from the liability to support such seaman.

It has been held that it was not the intention of the Act to comprehend cases of a forced and necessary dissolution of the contract, as by shipwreck, capture, seizure and forfeiture of the vessel, without the fault of the master or owners, or by any fortuitous occurrence, which human foresight and power could not provide. A discharge of the seaman to come within the meaning of the Act, must be a discharge by the voluntary act of the master, and not a mere separation from the vessel by the unavoidable breaking up of the voyage by misfortune. The Act is supposed to apply to cases where the original object of the voyage is a sale of the vessel in a foreign port. If, however, the vessel be sold in consequence of a disaster at sea, the owners will not be exempted from the payment of the extra wages, if the vessel could have been repaired at a reasonable expense and in a reasonable time, and the burthen of proof, to show that she could not have been so repaired, is upon the owners. *The Dawn*, Ware's R., 485.

CHAPTER XI.

P I L O T S .

Duty of the master with respect to taking a Pilot on board.—The master on both his outward and homeward voyage, in sailing down rivers, out of harbors, or through roads &c., where, either by the usage or the laws of the country, a Pilot is required, is bound to take one on board. A vessel coming out of a harbor, must have a Pilot on board, because the captain has it in his power always to procure one. But when he arrives off a port, as the law compels no one to perform impossibilities, it requires only that the master use all reasonable efforts to obtain one. In every well appointed port where Pilots are to be had, a vessel arriving upon pilot ground, is bound to make the approach carefully. If in the night, the master must hold out a light for a Pilot, and wait a reasonable time for one, and approach one if he can do it with safety. If he attempt to enter the port without a Pilot, or steer negligently or rashly in approaching the ground, when it is unsafe to navigate without a Pilot, and damage ensue, the underwriters are discharged from liability.

In rivers, roads &c., where it is not customary to take

a Pilot on board, the captain or mate, being duly qualified, or any other competent person may be relied on. If, however, in such a case, injury arise from want of ordinary prudence in the navigation of the vessel, the owners are liable to the shippers. *Keeler v. The Firemen's Ins Co.*, 3 Hill R. 250; *Flanigen v. Wash. Ins. Co.*, 7 Penn. R., 307.

There can be no doubt as to the duty of the master engaged in a foreign trade to put his ship under the charge of a Pilot, on both his outward and homeward voyage, when he is within pilotage limits. This is a duty he owes to his owners; and if he fail to take a Pilot, when he might have obtained one, and ground, the underwriters are discharged. And the neglect to take a Pilot, when it ought to be done, will subject the owners to a suit for the damages that may happen to shippers and others by such default. In *M. Millan v. U. Ins. Co.*, 1 Rice's S. C. R., 248, it was held that where the master fails to employ a Pilot to navigate a vessel, in coming into or leaving a port where it is customary to do so, and a loss happens in consequence of a Pilot not having been employed, the underwriters upon a policy on the cargo would be discharged. But if the vessel pass uninjured, and the loss happen at a point beyond which the Pilot's services cease to be necessary, the assured would be entitled to recover. The true principle was said to be this: If a vessel without a Pilot sustain injury in entering or leaving a harbor where it is customary to have a Pilot, that then such injury does not come within the perils insured against. It is not a peril of the sea; It is a loss from the bad naviga-

tion of the vessel, and is to be set down to the fault of the master, and, consequently, the owners would be liable for it. The general rule is, if the owners would not be liable for the loss, that then the insurers are.

But if no Pilot can be obtained, and the most judicious course be for the master to attempt to go into port without one, the owners will not be responsible for a loss happening in consequence of his so doing. *Vansyckle v. The sch'r. Thomas Ewing*, U. S. D. C., Penn., 3 Law Reporter, 449.

When they may become Salvors. Pilots are bound by the duties of their office or employment to be always ready, and to go out to vessels requiring their services, in all weathers, when they can do so without absolute danger to their lives. *The General Palmer*, 2 Hagg., 176. What they do in the ordinary course of their duty can never be made the foundation for a claim for salvage, and the difficulty and exertion being more or less in such a case can make no difference. They take their chance for such hazards; they know that they must be exposed to them; and it must be presumed, that the official compensation is calculated on the probability of such exposures. *The Elvira*, Gilpin, 65.

According to the maritime law of England, no Pilot is bound to go on board a vessel in distress, or in apprehension of distress, arising from antecedent causes, to render pilot service for mere pilotage reward; and if, being told he would receive pilotage only, he refused to take charge of a vessel in that condition, he would incur no censure. If he did take charge of her he would be

entitled to a salvage remuneration ; for the scale of remuneration to Pilots has been calculated on the idea of conducting into port a vessel not in a state of distress. *The Frederick*, 1 W. Rob., 17. The American doctrine is the same, with this difference, that the compensation beyond his official fees allowed to a Pilot for services transcending the limit of his ordinary official duties, is, in some of the American cases, denominated extra pilotage. *Hobart v. Drogan*, 10 Peters, 108 ; *Bark Richmond*, 4 Law Reporter, 20.

When a Pilot assumes the charge of a vessel, he is bound to use his best exertions to bring her over his pilotage ground. If a tempest arise, and she be threatened with being wrecked, his duty is to use his utmost exertions and skill to preserve her. All this is directly within the scope of his office, and the obligation it imposes. For such services he can claim his official compensation only. But even in such cases, he may entitle himself to salvage or extra pilotage by rendering services not required by official duty ; as, if a tempest should arise, and he should go off in a boat to the shore to fetch hands, and should risk his life for the safety of the ship, in a manner different from that which his duty required. *Hobart v. Drogan*, 10 Peters, 123. It is the duty of a Pilot when requested, to take charge of a vessel in distress, and to tow and pump her, whenever these services are required of him by the circumstances of the case ; but these acts so far exceed the line of his ordinary duties as to entitle him to a higher reward than the sum prescribed for common pilotage. *Wreck & Salvage*, by Judge Marvin, §146.

CHAPTER XII.

MARINE INSURANCE.

GENERAL PRINCIPLES.

The utility of Insurance in a country so largely engaged in commerce as the United States, is too obvious to render it necessary for us to expatiate on the subject.

The contract of Insurance protects, enlarges and stimulates maritime commerce; and, under its patronage, and with the stable security which it affords, commerce is conducted with immense means and unparalleled enterprise, over every sea, and to the shores of every country, civilized and barbarous. It is so necessary a contract, that maritime commerce cannot well be sustained without it, for no prudent ship-owner would be willing to risk his own fortune, and that of others, on an unprotected adventure at sea.

Insurers (or underwriters as they are generally called) are societies of capitalists, who are called by their business to study with profound sagacity, and with ex-

actness of calculation, the geography and navigation of the globe, the laws of elements, the ordinances of trade, the principles of international law, and the customs, products, character and institutions of every country where tide waters roll, or to which winds can waft the flag of their nation.

The party interested in the property insured, is called the *insured* or *assured*. The party undertaking to indemnify the assured against loss is called the *insurer* or *underwriter*. The property itself is called the *subject of insurance*. The title or interest which the assured has in this property, is called his *insurable interest*. The agreed consideration or stipulated sum for which the underwriter undertakes to indemnify the assured is called the *premium*. The instrument, by which the contract of indemnity is effected, is called the *policy*. That which is insured against, is loss arising from marine perils. These perils are, in technical language, sometimes called *the perils insured against*, and sometimes the *risks covered by the policy*. The interest of the assured is technically said to be *covered by the policy*, when the sum or aggregate of sums insured in the policy is sufficient to afford him full compensation for whatever loss that interest may sustain. If the value of his interest exceed the sum insured, the excess of interest is said to be "uncovered by the policy," and the assured to be "*his own insurer to that extent*." When the liability of the underwriter commences under the contract, the technical mode of expressing this is by saying that the "*policy attaches*, or "*the risk begins to run*," from that time.

Policy of Insurance, and its general construction.

In examining for the first time any question under a policy of Insurance, it is necessary to ascertain whether the contract have received a practical construction by merchants and underwriters; not through any partial or local usages, but by the general consent of the mercantile world. Such a practical construction, when clearly apparent, is of great weight, not only because the parties to the policy may be presumed to have contracted in reference to it, but because such a practice is very high evidence of the general convenience and substantial equity of it as a rule.

This is true of most commercial contracts; but it is especially true of a policy of Insurance, which has been often declared to be an "obscure, incoherent and very strange instrument," and, generally, more informal than any other brought into a Court of Justice; but which, notwithstanding the number and variety of the interests which it embraces, and of the events by which it is affected, has been reduced to much certainty, by the long practice of acute and well informed men in commercial countries by the decisions of courts in the United States and in England, and by able writers on the subject in this and other countries.

And it should not be forgotten, that, not only in the introduction of this branch of law into England by Lord Mansfield, but in its progress since, both there and here, a constant reference has been had to the usage of merchants, and the science of Insurance law has been made and kept a practical and convenient system, by avoiding subtle and refined reasoning, however logical it

may seem to be, and looking for safe practical rules. 14 *Howard's* Sup. Ct. Rep's., 223.

A Court of Admiralty, in cases within its civil jurisdiction, acts as a Court of Equity, and construes instruments, as a Court of Equity does, with a very large and liberal indulgence. *Pope v. Nickerson*, 3 Story's Rep's., 465.

Most policies contain phrases made necessary by the peculiar circumstances of each case, or introduced for the especial purposes of the parties. These phrases are, for the most part, mercantile phrases. They are used by merchants among themselves, and understood by them ; and much injustice would be done if the law did not interpret them in the way in which they are used and understood.

The validity and construction of a policy of Insurance, are also governed by the laws of the place where it was made and of the places to which it has reference in respect of acts to be done under it.

In policies of Insurance, as in all written instruments consisting of a printed form, there are blanks which are filled in manuscript. These written words are taken to be the immediate language and terms selected by the parties themselves for the expression of their meaning ; and greater strictness of construction is applied to these clauses and stipulations which the parties have themselves introduced, than to the words of the printed formula, which are adapted to all other cases of Insurance on similar subjects, and not confined to the circumstances of the particular adventure.

The usages of trade, as already mentioned, are to gov-

ern the construction of terms used in a policy of Insurance. But a usage, in order to affect the parties to a policy, must be conformable to law, and applicable to Insurance.

No usage is permitted to contradict the plain and positive provisions of the policy. Thus a usage not to pay for a particular part of the vessel's apparel or furniture, as a boat when it is in a certain place on the vessel, is invalid, if the place is that where it is usually carried.

There are certain known principles applicable to usage, laid down by all the writers on the subject:

1st. Usage is employed *only* to interpret the meaning of ambiguous terms in the policy.

2nd. Usage must be reasonable in itself and conformable to law.

3rd. Usage can never be introduced to alter or in any wise vary the explicit terms of the contract itself.

In the case of *Mutual Safety Ins. Co. v. Howe*, 2 Cunst, 235, Justice Sandford says: "We find it clearly settled, that a general usage, the effect of which is to control rules of law, is inadmissible. So of one which contradicts a settled rule of commercial law."

In *Turner v. Burrows*, 5 Wendell, 541, it was declared that unless the policy contain words, which by construction of law, would give the interpretation claimed, no usage can be introduced to prove it.

In *Mercantile Mut. Ins. Co. v. State Mut. F. & M. Ins. Co. of Penn.*, 25 Barb., 319, a case arising out of a denial of the defendants to a liability for re-insurance, the claimants sought to show the plain and common

usage of re-insurances as always prevailing in New York. It was excluded, because there was no ambiguity on the face of the instrument.

As the underwriters so constantly vary not only the usage but the terms of the policy, by the introduction of clauses, hardly any usage can be deemed applicable, as a law, to govern any portion thereof, but the liability will be judged exclusively upon the contract itself.

No particular period is requisite to the establishment of a usage. "The true test of a usage," says the Supreme Court of New York, "is its having existed a sufficient length of time to have become generally known." 1 Caines, 45 ; 9 Wheat., 581.

The true principle of construction, as applied to policies, is, that if the clauses of the policy be in themselves clear and unambiguous, the courts will not admit extrinsic evidence to contradict, to vary or to explain them. If, on the contrary, they be obscure and ambiguous, the courts may resort to any means of explaining them, which may be supplied by either the rules of the common law, the general usages of trade, or the particular circumstances of the case.

Usual clauses and requisites of the Policy.

In order to give the assured a knowledge of the instrument, we will consider some of the clauses which it usually comprises, and the main requisites in point of substance and form, which are essential to its validity as a contract.

Clause "Lost or not lost." As policies are frequently effected, not only on ships and goods in our home ports, but on those also which are in foreign ports, or actually at sea on their way either to this or other countries, from foreign ports, and with regard to which it is of course uncertain whether they may not actually have been lost before the policy was effected, these words, "*lost or not lost*", are inserted in every form of policy as a matter of course.

The clause, however, though never omitted, does not appear to be strictly necessary, as there can be no reason why a previous loss of the subject insured should prejudice an Insurance subsequently effected, *if both the assured and the underwriters were equally ignorant of the loss at the time.* 1 Arnould, 26. "But if an Insurance were made upon a ship from a particular day, and she had perished before that day, though unknown to both parties, no one would suppose," says Mr. Justice Story, "that the underwriters were bound for the loss." *Hammond v. Allen*, 2 Sumner's R., 387, 397.

Clause describing the voyage insured. The underwriter cannot know the nature of the risk he is asked to insure, nor consequently, the amount of premium he ought to require, unless he know the *nature of the voyage* on which the ship is to sail, or the goods are to be conveyed. It is therefore one of the most essential requisites of a policy of Insurance, that it should contain an accurate description of the voyage insured. All that is necessary, however, to be expressed in the policy, is the place and period at which the voyage insured is to

begin, and the place and period at which it is to end, and which are called in the technical language, the *terminus a quo*, and the *terminus ad quem* of the voyage insured, or of the risk. *Cleveland v. Union Ins. Co.*, 8 Mass., 308

The distinction between insuring with the words "*at and from*" a place, and simply insuring "*from*" it, may be thus explained; An Insurance expressed in the policy to be "*from* Liverpool to Boston" only protects the subject insured from the moment of the ship's sailing from Liverpool; an Insurance *at and from* protects the subject insured from the first moment of the ship's arrival at Liverpool and during her whole stay there. *Seamans v. Loring*, 1 Mason, 127; *Patrick v. Ludlow*, 3 John Cas., 10.

As it is especially desirable, in case a ship be expected to arrive at a certain port *abroad*, to protect her during her whole stay in such port, from the moment of her arrival, the form of Insurance "*at and from*" ought always to be adopted in insuring homeward voyages. From the many advantages it presents, this form is almost always used in practice.

Clause describing the Commencement and Termination of the Risk. The meaning of this clause is, that the risk upon the *goods* is to commence from their being loaded on board the ship wherever that may be; to continue upon them during the whole time they remain on board, and not to terminate until they have been discharged from the ship and safely landed at the port of delivery.

The risk upon the ship is to commence at the port from which she sails on the voyage insured, wherever that may be, to continue during her stay there, and not to terminate until after she have moored at anchor for twenty-four hours in good safety, at her destination. This means safety from the perils insured against, and not those of a merely local character and incident to the port, as bad moorings &c., otherwise the policy might attach all the time she lay there. But a ship cannot be considered to have been moored for twenty-four hours in good safety, unless she be in such a state, and under such circumstances as to have an opportunity of unloading and discharging cargo. She must, therefore, be moored, as safely as that harbor or port permits in the usual course of navigation. And if the vessel be ordered off or into quarantine, before the twenty-four hours have passed, the policy does not cease to attach. *Waples v. Eames*, 2 Strange, 1243. And if she anchor and moor safely, and her actual safety continue through a storm or peril which begins before or within the twenty-four hours, but does no harm until they have expired, she is considered as moored in safety during the twenty-four hours; because otherwise the risk might never terminate, for so long as the ship is in any port, she must be in some degree of danger. *Bell v. Mason*, 6 Mass. R., 213.

Reaching the harbor, therefore, cannot be arriving, within the meaning of the policy, and if it do not mean that, it must mean that particular place or point in the harbor, which is the ultimate destination of the ship. Until that point be reached, the voyage is not ended, and

the ship has not arrived ; though she may be obstructed and delayed in her progress through the harbor, and for want of water, or by adverse winds or other causes, be obliged to come to anchor, and remain at anchor twenty-four hours to take out some portion of her cargo. While she is properly pursuing her course to the place of her ultimate destination, and of complete and final unloading, and while she reaches that place, and has been moored there in safety twenty-four hours, she is insured and protected by the policy. *Meigs v. Mutual Ins Co.*, 2 Cush., 439.

Liberty to Touch or Stay. The course of the ship's navigation, is never in terms expressed in the policy ; but it is an implied condition of every policy, that the ship insured, in sailing between the termini of the voyage insured, shall pursue that course or track which long usage has established to be the safest and most direct mode of navigation, without deviating from such course to touch at any ports or places whatsoever, which lie between the extreme points of the voyage, unless express liberty for that purpose be inserted in the policy.

Clause empowering the assured to labor &c. for the recovery of the property insured. This clause was introduced to obviate a notion which appears at one time to have prevailed, that if the assured, after a loss which threatened the total destruction of the property insured, were, either by himself or his agents, to take active measures for its recovery or restoration, he would thereby lose the right to abandon, which he might otherwise

have exercised. The object of this clause, therefore, is to permit the assured in such cases to take every measure for the recovery of the property without waiving his right of abandonment, and also to bind the underwriters to contribute in proportion to the amount of their several subscriptions, to reimburse the assured for the expenses which he may thereby have incurred. The language of the clause is only permissive, but it has long since been settled, that it is a clear duty of the assured so to labor for the recovery and restitution of the detained or damaged property. 1 *Arnould*, 29; 2 *Phillips*, 439.

The Memorandum. This is introduced into all policies for the purpose of exempting the underwriters from all liability for trivial losses, or for partial losses of any kind, arising from sea-damage, to articles of a perishable nature. In all policies in New York, it is in the following form: "*It is also agreed that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wicker-ware, and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, vegetables and roots, rags, hempen yarn, bags, cotton bagging and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses and all other articles that are perishable in their own nature, are warranted, by the assured, free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under twenty per cent.,*

unless general ; and coffee, in bags or bulk, pepper in bags or bulk, and rice, free from average under ten per cent., unless general."

"Warranted by the assured free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea-water with the articles damaged, occasioned by sea-perils. In case of partial loss by sea-damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise ; and the same practice shall obtain as to all other merchandise, as far as practicable. Not liable for leakage on molasses, or other liquids, unless occasioned by stranding or collision with another vessel."

All other goods pay average when it amounts to *five per cent.* and upwards ; but special agreements can be made in reference to all goods, altering the customary per centage in the warranty or entirely shutting them out from the payment of average. In the latter case, the underwriters, of course, charge a less premium.

Where the memorandum clause warranting the cargo *free from average unless general*, applies, the underwriters only are liable (in case of injury to the cargo itself as the cause of loss) in the event of a total physical loss of the cargo ; the whole must be so damaged that it cannot reach its port of destination specifically as merchandise. The insurer is not liable if any part of the cargo remain undamaged. *Hugg v. Augusta Ins. & Banking Co.*, 7 Howard's Sup. Ct. R. 595 ; *Maggrath v. Church*, 1 Caines, 196 ; *Neilson v. Col. Ins. Co.*, 3

Caines, 108; *Le Roy v. Gouverneur*, 1 Johns Cas., 226; *Griswold v. New York Ins. Co.* 1 Johns, 205; *Saltus v. Ocean Ins. Co.* 14 Johns, 138; *Whitney v. New York Firemen's Ins. Co.* 18 Johns, 208; *Brooks v. Lewis, v. State Ins. Co.*, 4 Martin, N. S., 640; *Moreau v. U. S. Ins. Co.*, 1 Wheat., 219; *McGaw v. Ocean Ins. Co.*, 23 Pick., 405; 3 Sumner, 544; 1 Story, 342. On reference to the above authorities, it will be seen, that in order to render the underwriters liable for a total loss of memorandum articles, there must be a destruction of the articles *in specie*, the goods must have lost their original character, otherwise there cannot be a total loss of the article, whatever may be the extent of the damage, so as to subject the underwriter.

There can be no constructive total loss of memorandum articles, the underwriters being liable in the event only of a total physical destruction of the object insured, or a total destruction of value.

But if, by reason of a peril insured against, a memorandum article be placed in such a condition, that if carried forward, its species would become extinct before reaching the port of destination, and be accordingly sold at an intermediate port, this will constitute a total loss within the meaning of the memorandum clause.

The underwriters are liable for General Average charges on memorandum articles.

Open Policies and Valued Policies.

If a policy do not state the agreed value of the property insured, but leave that for proof, it is called an

open policy; but if the policy state what the parties have agreed upon as the value of the property, it is called a *valued policy*. If the valuation thus agreed upon be intended neither as a cover for a wager, by both parties, nor fraudulently made by the assured, it is binding on the parties, and determines the value of the property. If the parties, without intending to wager, fairly agree to estimate the property at a high rate, their agreement will be valid. Unless the valuation be grossly enormous, so as to be indicative of fraud, it will not be inquired into. In *Alsop v. Commercial Ins. Co.*, 1 Sumner, 451, 473, which was a case of insurance upon profits, Mr. Justice *Story* said: "I do not know that any over-valuation, however great, if it steer wide of a wager and a fraud, can be otherwise impeached." Some value, however, must be proved, or the policy never attaches.

A valuation in a policy affects only the parties to it, and the same property may be valued differently in different policies, and each valuation will be valid as respects the parties to the contract of which it is a part.

Vessels are generally insured by valued policies. This prevents the trouble and perplexity attendant upon proving the value of the ship after the loss has occurred. Goods are more frequently insured by open policies, as the value is easily proved by the invoices, or by showing the price current at the time.

In the adjustment of General Average, the valuation in the policy is not regarded, as the adjustment is usually made at the port of destination, and upon the value

of the property at that port. Whether the property be insured or not, valued in the policy or not, is not a matter of inquiry in adjusting General Average. When the adjustment has been made, and the ship, freight or goods have contributed, the owner may, then, if there were Insurance upon either, call upon the underwriters for the amount thus contributed.

But in case of partial loss of a ship or goods, the valuation in the policy must prevail in adjusting the loss.

Ship and freight may be insured jointly, in the same policy though more frequently insured in separate policies. The following rules respecting the effect of the valuation of freight, are deemed to be settled :

1st. If the parties to a policy have in view the freight of a particular cargo of merchandise, and value that freight at a fixed sum, the subject of Insurance and valuation is the entire cargo, and if only part of its freight be put and continued at risk until the loss, a proportional part only of the sum fixed as the valuation can be recovered.

2nd. If the subject insured and valued be not the freight of a particular cargo, but an expected freight only, which may or may not be that of a full loading of the vessel, and some cargo be obtained, and some freight be at risk, the valuation attaches upon that, and the whole sum of the valuation may be recovered, in case of a total loss of the freight at risk.

3rd. But if, at the time of the loss, there be no freight pending, there is no subject to which the policy can attach, and consequently the valuation becomes inope-

rative ; unless the policy, besides the valuation, contain the clause “on board or not on board,” or some equivalent stipulation. This, if it take effect, precludes the inquiry respecting the fact whether any freight were at risk, and consequently the valuation attaches and becomes effectual, upon the assumption that there was freight at risk, the value of which is agreed to be the sum fixed for the purpose.

4th. Whatever sum the insured receives for that freight which was the subject of valuation and Insurance, must be deducted from the amount of the valuation in adjusting a loss otherwise total. But money received as freight, though earned in the course of the voyage or period of time described in the policy, if it were not part of that freight to which the Insurance is attached, and the valuation applicable at the time of the loss, is not to be deducted from the amount of the valuation in adjusting a total loss of freight. For example : if Insurance be made on the entire freight for the round voyage from Boston to Liverpool, and thence back to Boston, the entire freight for the round voyage being valued at ten thousand dollars, and the outward cargo be delivered at Liverpool, and freight earned thereon, and the vessel be totally lost on the return passage, the amount received on the outward freight is to be deducted. The entire freight of the round voyage being the subject of Insurance and valuation, whatever was received by the owner out of that subject, was received, as *Emerigon* expresses it, to the use of the underwriters.

5th. If the freight of no particular voyage were in

contemplation, and the Insurance were on time, then the policy and the valuation attach successively and distinctly on each successive freight which is at risk. Each successive freight, whether for a round voyage or one passage, becomes the subject insured and valued, and consequently what has been received on account of previous voyages or passages, not being any part of the subject insured and valued at the time of the loss is not to be deducted from the valuation.

The amount of insurable interest in all *open policies*, is taken to be that which they are worth to the assured at the commencement of the risk, with the premium added ; and the principle upon which the amount of indemnity, recoverable by the assured in case of loss, is regulated, is, that he must be replaced as nearly as possible in the same position as he was in at the outset of the adventure, and before effecting the Insurance, without paying any regard to the profit he may have missed making in the case of goods, or to the wear and tear by which his property has been deteriorated in the case of the ship.

Expected *profit* on a maritime adventure, is an ordinary subject of Insurance. Insurance on profits is usually made by a valuation. In the United States it is frequently agreed by the parties that the adjustment of the loss on profits or commissions shall correspond to that on goods on which the profits or commissions are to accrue. But without any such express agreement, the adjustment of a partial loss on profits or commissions on goods damaged, or a part of which are lost by the perils against which the profits or commissions are

insured, is at the same rate per centum as that on goods.

In a policy upon the profit of goods, the Insurer undertakes that they shall not be prevented by the perils insured against, from arrival at a certain market. If a part of the goods only be prevented from arriving, it constitutes a partial loss upon this interest.

INSURABLE INTEREST.

The interest which it is necessary for every one to have, before he can effect an available Insurance on his own account or for his own benefit, is called an *Insurable interest*.

The insured must have an interest in the subject of Insurance; and this interest must be at risk. If he have no interest, or if his interest be not at risk he can be liable to no loss, and accordingly there is nothing, against which the underwriters can agree to indemnify him.

As Insurance is essentially a contract of indemnity, the insurer can be called upon to make good only a loss sustained.

In order to constitute an Insurable interest against any peril it must be such an interest that the peril may have a direct effect upon it instead of a remote, circuitous, consequential effect. That is to say, the interest must be a direct one, in reference to the perils insured against.

In order to entitle the assured to recover on the policy, it is necessary that the interest, in respect to which

the Insurance is effected, was an interest subsisting at the time of the loss; but it is not necessary that the interest be subsisting at the time of effecting the policy. *Lane v. Marine Mutual F. Ins. Co.*, 12 Maine, 44.

The assured, who has been interested during the risk, but has parted with his interest before loss, cannot recover on the policy. But if he have not parted with his interest till after the loss, he can recover.

The person who pays for repairing a vessel, has not, by force of that fact, an Insurable interest in her. The repairs become a part of the vessel, and having no lien for the money expended, he has no Insurable interest in it, unless when secured by a lien by law or contract.

The persons employed to repair the ship, or in general to do any work about her, and those who furnish for her use, supplies of things necessary to her equipment and safe navigation, are known in the law of shipping as "material men."

All *material men* have a lien on the ship; provided the supplies were necessary and could be obtained by a credit on the vessel only. *Pratt v. Reed*, 19 Howard, 359. It has accordingly been held, that it must be proved that the owner had no funds or credit on which to procure the supplies except the credit of the vessel. *Brown v. propeller Albany*, U. S. Dist. Ct. of N. York, February term, 1858. Mr Justice *Curtis* has, however said, after speaking of the decision in *Pratt v. Reed*, that "the liens given by the local law do not depend on the same requirements." *The Young Sam*, 20 Law

Reporter, 608, 610. There is no lien on domestic ships, unless it be given by the law of the State in which the supplies are furnished. For the purpose of this distinction, each of our States is considered foreign to the rest; so that material men in New York would there have a lien in admiralty for work done on a Philadelphia ship. *Pratt v. Reed*, 19 Howard, 359.

It may be said, generally, that any interest may be insured if the peril against which Insurance is made, would bring upon the assured, by its immediate and direct effect, a pecuniary loss. Hence, all persons who have a *lien* on any property, as salvors, or who make any pecuniary gain out of property, as factors on commissions, consignees, agents, carriers or other bailees may insure whatever interest they have.

Where money is lent on *bottomry*, it is understood that if the ship be lost, the lender loses also his whole money; but if the ship arrive in safety, then he receives back the principal, and also the premium or maritime interest agreed upon, however much it may exceed the legal rate of interest. There is greater reason, therefore, why the lender on *bottomry* should have an insurable interest in the thing pledged, than that a mortgagee should have such an interest; for, if the property be lost, he loses his debt, whereas a mortgagee still has his claim subsisting against his debtor. It has always been held that the lender has an insurable interest in the ship or goods hypothecated. But the insurable interest of a party to whom property is hypothecated will depend upon the validity of the hypothecation.

The *borrower* on *bottomry* and *respondentia*, has no

insurable interest, except in the surplus by which the value of the hypothecated property exceeds the amount of the loan. If, therefore, goods be hypothecated for the full value, the borrower is not interested in their safety, as far as the risks are assumed by the lender; for if they be lost by the risks, within the hypothecation, he is discharged from the debt. He is accordingly interested so far only as the value of the property exceeds the amount for which it is pledged.

A *consignee, factor or agent*, having a lien on goods, to the amount of his advances, acceptances and liabilities, stands in this respect precisely in the situation of a mortgagee. A debt is due to him from his principal, for which he holds the property as collateral security, and the property is at the risk of the principal, as the debt would still subsist though the property should be lost; and the excess over the proceeds of the goods would still be due to him in case of the proceeds being insufficient to satisfy his claim. He has therefore an insurable interest in the goods to the amount of his lien. *Van Natta v. Mutual Security Ins. Co.*, 2 Sandford, 490.

There are different kinds of consignees; some have a power to sell, manage and dispose of the property, subject to the rights of the consignor only; others have a mere naked right to take possession, and others, though not intrusted to sell, are yet interested in the property, as having a lien or claim upon it for their advances. The rights of these different kinds of consignees to effect an Insurance, must vary with the various relations in which they stand to the property and to the consignor.

A *commission merchant*, to whom goods are consigned for sale, has an insurable interest to the amount of his commissions on the sale, from the time of the goods being consigned to him. He may make insurance in anticipation of the consignment being made, and the goods becoming subject to the risks insured against. *Putnam v. Mercantile Marine Ins. Co.* 5 Metcalf, 386. Mr. Justice *Hubbard*, in delivering the opinion of the court said. "The law of Insurance has been most reasonably extended to embrace within its provisions, cases where the parties having no ownership of the property, have a lien upon it, or such an interest connected with its safety and its situation, as will cause them to sustain a direct loss from its destruction or from its not reaching its proper place of destination. Such rights have received protection, and the expectation of profits, the loan upon mortgage or respondentia, the advances of a consignee of a master or supercargo, are all now well recognized subjects of Insurance."

The *master* of a vessel, is merely a carrier and in his capacity of master merely, has no general insurable interest in the ship, cargo or freight. *Barker v. Marine Ins. Co.*, 2 Mason's R., 369. A master, however, may insure his commissions, his wages or the freight of goods carried by him on his privilege. *Holbrook v. Brown*, 2 Mass., 280; *Foster v. Hoyt*, 2 Johns Cas, 327. If the master sail the vessel on shares, he has an insurable interest in the freight to the amount of his share, and his indebtedness on account of the freight in addition. *Haines v. Rowe*, 40 Maine, 181.

If the *charterer* of a ship contract to pay the owner

for the ship, in case of loss, he has an insurable interest in her, and may effect Insurance upon her in his own name. *Bartlett v. Walker*, 13 Mass. R. 267.

A *mortgagor* has clearly an insurable interest in the mortgaged property, and that to its full value; for in case of loss he would not be deprived of the thing insured only, but be compelled also to pay the mortgage debt. A *mortgagee* has also an insurable interest in the mortgaged property to the amount of his claim. Where a mortgagee, or one having a lien, insures his own interest in property, a payment of a loss to him by the insurers does not discharge the debt for which the mortgage or lien is the security. The want of privity between the mortgagor and the insurers is a conclusive objection to the mortgagor's claim to such discharge. *Ætna Fire Ins. Co. v. Tyler*, 16 Wend., 385, 397.

As the mortgagee's motive in insuring is to preserve his security, and as the Insurance must be construed to be made with express reference to the mortgage interest, whether specified or not; a question arises whether upon the happening of loss, and payment thereof to the mortgagee (he having insured for his own benefit, and paid the premium out of his own funds), the insurers can demand from him a transfer of the mortgaged debt? The legal rights of the assurers in this respect, have not been satisfactorily defined by the courts, but the better opinion seems to be, that the insurers, upon the payment of loss, are entitled to have secured to them the debt of the mortgagor or some portion of it corresponding to the amount insured. Until this question receive a clear and final adjudication from the courts, it is desirable, to

avoid litigation, that the assured, by a special clause in the policy, be held bound, in case of loss and payment thereof to transfer the mortgage debt to the insurers. The engagement of the insurers is merely to stand in the place of the assured, and to incur the same risks as he is incurring. The whole law of Insurance is *indemnity*, one of the principles of which is that insurers who pay a total loss are subrogated to all the rights, interests and claims of the assured, in or about the interest insured. And all the ends of indemnity can be best gained if the assured be held bound to transfer the mortgage debt to the insurers. 7 Cushing, 1; 16 Peters, 495, 501; 16 Wendell, 385, 397; 5 Duer, 1.

Freight paid in advance, constitutes an insurable interest, but only when, and because, it is no longer at the risk of the ship-owner, but of the shipper. *Samson v. Ball*, 4 Dall, 459. If the advance be made merely on account of freight which is to become due only upon delivery of the goods at the port of destination; or a payment with a right of reclamation if the cargo be not so delivered, then the *shippers* have no insurable interest in it. But, where the understanding is, that the advance is a payment absolutely without the right of reclamation, the insurable interest is vested wholly in the *shippers* of the cargo, and the ship-owner not having any interest at risk, so far as concerns the freight prepaid, has nothing to insure.

Underwriters on freight can cover only that which is at risk; and if a total loss occur, they are entitled to what is saved only of that which was at risk.

The English rule as to the recovery of freight, paid in

advance, is stated by the text writers to be, that freight so paid is paid absolutely, and cannot be reclaimed, though the goods be not carried to the port of delivery, unless there be a special agreement to that effect. Hopkins, pp. 80, 83, 235. 3 Kent (9th ed.) 306. Abbott on Ship. (7 Am. ed.) 530.

Such a rule however, is contrary to the general principles and policy of the law, and the decisions cited in support of the supposed rule, seem to have turned on the particular terms of the bill of lading, or the circumstances of the contract in each case; a distinction being made in some of the cases between an agreement to *receive on board* for carriage to the port of destination, and a contract, in the usual form of our bills of lading, to *carry and deliver*. Compare *Mashiton v. Buller*, 1 Camb, 84, and *Blakey v. Dickson*, 2 B. & Pul., 320, with *Andrew v. Moorhous*, 5 Taunt, 435; also, *Mansfield v. Maitland*, 4 B. & Ald, 584, with *Desilvale v. Kendall*, 4 M. & S., 37.

The more correct statement of the rule, fairly deducible from the English cases, would seem to be that whether freight paid in advance, can, or not, be recovered back, in case of non-performance of the voyage, is a question of intention; or in other words, that it depends on the peculiar terms and conditions of the agreement under which the freight was paid.

But whatever may have been the course of the English decisions, it appears to be now the established law in the United States, that freight paid in advance may be reclaimed and recovered in case of non-performance of the voyage without fault of the shipper, unless there

be a special agreement to the contrary. *Watson v. Duykink*, 3 Johns, 335; *Phelps v. Williamson*, 5 Sandf., 578; *Pitman v. Hooper*, 3 Sumner, 50; *Reina v. Cross*, 6 Cal., 29; *Griggs v. Austin*, 3 Pick., 20; *Lacson v. Worms*, 6 Cal., 365; *Brown v. Harris*, 2 Gray, 359.

The New York case of *Watson v. Duykink* (3 Johns, 335) recognizes and turns upon a distinction similar to that noted in the English cases; and though upon the particular circumstances of that case (in which a usage is said to exist in New York, that freight paid in advance under such circumstances is paid absolutely) the decision there made is against the reclamation of such advance; the general rule of law in this country is affirmed as above stated.

PRIOR INSURANCE, DOUBLE INSURANCE AND RE-INSURANCE.

The marine policies of this country usually contain a clause to the effect, that if there be any prior insurance, the insurers shall be liable for so much only as the prior insurance may fail to insure of the property. Of course, under such a provision, a second policy insures the uninsured excess only, of interest remaining after the first; the third policy the same excess remaining after the second, and so on. And this clause relates to priority in effecting the Insurance, and not to priority in the commencement of the risk; and the actual time of making the contract, may, for this purpose, be proved to be different from its written date. 2 *Parson's Mar. Law*, 97;

Lee v. Mass. Fire & M. Ins. Co., 6 Mass., 208.

If the subsequent policy contain no provision in respect to prior Insurance, the assured may insure with different underwriters to any amount, if he will pay the premiums, and recover indemnity from any of the underwriters whom he may elect to sue. But the assured can recover the real amount only of his loss, to which all the underwriters shall contribute in proportion to their several subscriptions. *Lucas v. Jeff. Ins. Co.* 6 Cowen, 635.

Where there is the usual clause respecting prior Insurance, it does not apply if the policies be simultaneous, for in that case all are liable, but *pro rata*. 2 Mason, 475 ; 18 Pick., 145. They are held to be simultaneous, if, as is sometimes done, the policies so state ; or if they bear date the same day, and there be no evidence of any difference in the time of their making. But although dated and made on the same day, if they be not declared to be simultaneous, it may be shown by evidence that one was made before the other, and they are then not simultaneous. 2 Mason, 475.

Some policies contain the clause, that, in case of other Insurance, the assured shall not recover any greater proportion of the loss than the amount insured in the policy bears to the whole amount insured on the property. The construction put upon this clause in New York was, that in case of loss, if the other underwriters had settled under the other policies containing the same clause, that would not affect the policy in question ; for in that case each set of underwriters would pay their proportion only of the loss, and the greater the aggre-

gate amount insured over the whole value of the property, the less each set of Insurers would be liable to contribute. But it was held that if the other policies did not contain a similar clause, and the underwriters in those had paid the whole amount of the loss, then the assured would recover nothing under this policy, because the underwriters in this policy would, in such case, be liable to contribute to the other underwriters proportionally. *Lucas v. Jefferson Ins. Co.*, 6 Cowen, 635.

In ascertaining the amount to which a second or any subsequent policy is applicable, where a prior policy is to be deducted, the amount covered by such prior policy only is to be deducted. It is evident accordingly, that the premium, with the premium on the premium in the prior policy, is not to be included in the amount to be deducted, but only the amount which the assured would be entitled to recover besides his premium. For instance, if one insure a thousand dollars in the first policy, and pay a premium of fifty dollars for the Insurance, the value of the subject will be covered by such prior policy to the amount only of nine hundred and fifty dollars, this last sum being the amount to be deducted in estimating the amount of interest under the second policy. 2 Phillips, 1257.

If the value of the same subject be higher in a second policy, the amount only (not the proportion) insured by the first is to be deducted from the amount of the value in the second, in estimating the amount considered under the second not to be insured in the first. Four thousand dollars being insured on a ship and cargo valued

at that sum, a subsequent policy was made on the same ship and cargo valued at six thousand dollars, with the usual clause as to prior insurance. The question was, how much remained to be covered under the second policy? And Mr. Justice *Washington* held the amount of Insurable interest under the policy, to be two thousand dollars. *Murray v. Ins. Co. of Pennsylvania*, 2 Wash. C. C. R., 186; *M'Kim v. Phœnix Ins. Co.*, 2 Wash. C. C. R., 89.

Whether, if divers policies containing the clause relative to prior insurance be successively made on property of an amount sufficient at the outset to fill them all, but which, after the risk has begun, is diminished below that amount, the Insurance under the several policies is diminished proportionally, or the risk continues to the full amount on the prior policies, and ceases under the subsequent ones? "The inquiry," says Mr. *Phillips* (vol. 2, §1261) "relates to policies under which the risk has commenced, and the premium is not returnable. There seems to be nothing in the common phraseology of the policy to prevent the construction, that the clause refers to the commencement of the risk, and that, when the policies have once attached to a cargo, the operation of the clause ceases in respect to such cargo; and in case of the subsequent diminution of the amount at risk below the aggregate amount insured, by landing a part of the property or otherwise, the amount covered by each of the policies is diminished proportionably. This construction, if it be admissible, apportions the risk according to the premium on all the policies, whereas the other construction in question occasions a disproportion-

tion in this respect; since, if, under this latter, two policies of \$1,000 each be successively made upon a cargo worth \$2,000 for a voyage to successive ports, and when one half of the voyage is performed, half of the goods be landed, \$1,000 only will remain at risk under the prior policy for the remainder of the voyage, so that for the same premium the risk under this policy will be double that under the other."

"The construction that a diminution of the amount affects the policies proportionally, seems conclusively to result from the usual provision, that the premium shall be returned upon so much of the sum insured as the underwriters shall be exonerated from by the prior insurance, thus specifically providing for a concurrence of the exoneration from risk and return of premium, and requiring the return in case of exoneration."

"The above reasons seem to constitute good ground of dissent from a decision of the Supreme Court of New York, confirmed in the Court of Errors, Senators Tracy and Jones dissenting. Under divers time policies upon a cargo, exceeding its full amount, on a trading voyage to South America, all containing the clause relative to prior insurance, by the landing of a part of the cargo the amount remaining on board of the ship, at the time of a total loss, was reduced below the amount insured in all the policies. The prior insurers were held to be liable for the whole of the loss, in exoneration of the subsequent ones. *American Ins. Co. v. Griswold*, 14 Wend., 399."

"But for the above reasons, the better doctrine seems to be, that the clause relative to prior insurance, in the

common form, as between the underwriters, on divers policies has reference to the commencement of the risk upon any specific subject ; and after the risk on cargo, of an amount sufficient to fill any or all of the policies, has commenced, if a part of the property be subsequently withdrawn, so as to reduce the amount below the aggregate amount insured by the policies, what remains is to be ratably apportioned to the several policies."

Under the clause relative to prior insurance, the amount of interest to which a subsequent policy applies, will depend upon the amount insured in the previous policies, and also upon the valuation in the subsequent one. A cargo valued in a prior policy at \$12,000, the amount insured, was valued in a second policy at \$27,500. Though the whole cargo was insured in the first policy, yet there remained an insurable interest of \$15,500 for the second, since, as the property was valued in the second policy, this excess remained over the amount previously insured. 2 *Phillips*, 1262 ; *M'Kim v. Phœnix Ins. Co.*, 2 Wash. 89 ; *Higginson v. Dall*, 13 Mass. R., 96 ; *Minturn v. Columbian Ins. Co.*, 10 Johns, 75 ; *Kane v. Commercial Ins. Co.*, 8 Johns, 229 ; *Pleasants v. Maryland Ins. Co.*, 8 Cranch, 55.

Double Insurance, or, which is the same, over-insurance, is where two or more Insurances are made in favor of the same assured, on the same interest in the same subject, against the same risks and the whole amount insured exceeds the value of the whole subject matter.

Where different risks are insured against by the same

party on the same interest not over its full amount in each of two or more policies, it is not an over-insurance, and the provision respecting prior and subsequent Insurances is not applicable. *Perkins v. N. E. Mar. Ins. Co.*, 12 Mass. R., 214.

If the aggregate amount insured by divers policies on a subject do not exceed the value in one of them, as estimated under the common rule, or as agreed, it is not a double insurance in respect to such one. As where, one thousand dollars being insured by a prior policy in which the subject is valued at that amount, the same sum is insured in a subsequent policy, in which the subject is valued at two thousand dollars. 1 *Phillips*, 368; *Murray v. Ins. Co. of Penn.*, 2 Wash. C. C. R., 186; *Higginson v. Dall*, 13 Mass. R., 96; *Minturn v. Columbian Ins. Co.*, 10 Johns, 75; *Pleasants v. Maryland Ins. Co.*, 8 Cranch, 55.

Re-insurance is defined to be a contract by which, in consideration of a certain premium, the original Insurer throws upon another the risk for which he has made himself responsible to the original assured, to whom, however, he alone remains liable on the original Insurance.

Every Insurer has an insurable interest for re-insurance. The re-insurance may be against all or a part of the risks that have been assumed by the re-insured in the original policy in which he is the insurer.

An underwriter, by subscribing a policy, acquires no property in the subject insured, yet he acquires an insurable interest, and, having rendered himself direct-

ly liable to loss from certain perils, may stipulate to be indemnified against those perils. His interest, however, exists only in relation to the perils against which he has insured in the original policy.

REPRESENTATION AND CONCEALMENT.

Any contract obtained by the fraud of a party, is void in respect to the other parties. This is especially the case in regard to Insurance, in which fair dealing and good faith are strictly required by the law, and much relied upon by the parties. The contract is generally entered into by the insurer in consequence of the *representations* of the assured, and if these representations do not enable the insurer to make a just estimate of the risk, it is plain that he ought not to be bound by the contract.

A *representation* in the technical sense which the word bears in the law of Insurance, is defined to be; a verbal or written statement made by the assured to the underwriter, before the subscription of the policy, as to the existence of some fact or state of facts, tending to induce the underwriter more readily to assume the risk, by diminishing the estimate he would otherwise have formed of it.

A fact or statement having such tendency is called a *material* fact or statement. One having no such tendency is called *immaterial*.

If either party, whether by design, or through negligence, mistake or oversight, conceal or misrepresent a

fact material to the risk, the contract is void with respect to the other party.

A representation made to an underwriter must be true, or he is discharged ; and if the assured represent facts without knowing the truth, he takes the risk upon himself.

If the assured, or his broker, omit to state a material circumstance, supposing it not to be material, this discharges the underwriter.

If the underwriter insure a vessel that he knows to have arrived, the policy is void.

The representations ought to be reduced to writing and signed by the parties. If an Insurance broker make representations that he ought not to have made, he is liable for the damages that may ensue therefrom to his principal.

Where there is a misrepresentation, the Insurance is for all purposes null and void, and not voidable only. *Clark v. New England Mut. F. Ins. Co.*, 6 Cushing, 342.

To constitute a representation, there should be an affirmation or denial of some fact, or an allegation which plainly leads the mind to an inference of a fact. *Livingston v. Maryland Ins. Co.* 7 Cranch., 535.

If the assured state a mere expectation or opinion, or express himself in a qualified or doubtful manner, yet at the same time fairly, but without any absolute assertion of a fact, it is not a representation, and does not avoid the policy. 2 *Duer* on Ins. 644.

It is a misrepresentation under the law of Insurance, when it is false, whether intentionally so or not, and

tends to obtain for the party uttering it some advantage in the bargain, or an entering into the bargain by the other party. And it has the same effect whether made in reference to a matter concerning which some representation is necessary or otherwise. *Sawyer v. Coasters' Mut. Ins. Co.*, 6 Gray, 221.

It is the duty of the assured to communicate every species of intelligence which he possesses, which may affect the mind of the insurer, either as to the point whether he will insure at all, or as to the rate of premium. The contract of Insurance is one of mutual good faith; and the principles which govern it are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring Insurance is not at the time in possession of any fact material to the risk, which he does not disclose; and that no known loss had occurred which by reasonable diligence might have been communicated to him. *McLaughlin v. The Universal Ins. Co.*, 1 Peters' S. C. R., 185.

The assured is not required to represent facts of general notoriety, or which are presumed to be known to those conversant with the trade; but he is required to state fairly and fully other facts within his knowledge that are *material* to the risk. If a knowledge of the circumstances suppressed would have induced the insurer to demand a higher premium, or to refuse to underwrite, it will invalidate the policy.

One of the tests, and certainly a decisive test, whether a misrepresentation or concealment be material to the risk, is to ascertain whether, if the true state of the

property or title had been known, it would have enhanced the premium. If it would, then the misrepresentation or concealment is fatal to the policy. *Columbian Ins. Co. v. Lawrence*, 1 Peters, 516.

Concealment in the law of Insurance, is the suppression of a material fact unknown to the other party, which refers to the pending bargain, and is material to its terms. *Maryland Ins. Co. v. Ruden*, C. Cranch, 338.

In Marine Insurance, the misrepresentation or concealment by the assured, of a fact material to the risk, will avoid the policy, although no fraud were intended. *Burritt v. Saratoga M. F. Ins. Co.*, 5 Hill, 188; *Curry v. Commonwealth Ins. Co.*, 10 Pick, 535; *Sawyer v. Coasters' Mut. Ins. Co.*, 6 Gray, 221.

All intelligence ought to be communicated to the underwriter which may affect his judgment, either: 1st, as to the point whether he will insure at all; 2d, as to the point at what premium he will insure; and this duty attaches at the time of effecting the policy. Consequently, though the intelligence concealed may turn out to be unfounded, or the loss may arise from a cause totally unconnected with the fact concealed, the policy will nevertheless be void. *Lynch v. Hamilton*, 3 Taunt. 37, 44.

The principle which must be clearly apprehended and remembered upon the subject is, that every thing material must be disclosed, and stated truly; and that, to determine whether any fact, actual or rumored, is material, we must ascertain whether that fact would natu-

rally and reasonably enter into the estimate of risk, or the reasons for or against entering into the contract of Insurance. The whole object of the rules as to representation, misrepresentation and concealment, is to enable the insurers to judge accurately of the risk they undertake.

RETURN OF PREMIUM.

It is a general rule, subject to some exceptions, that, if the thing insured have never been brought within the terms of the contract so that the insurer might have been liable for a loss occasioned by the perils insured against, the premium must be returned to the assured, or the premium note cancelled, deducting, however, one-half per cent. on the amount insured, or making such other deduction as is stipulated for. But if the property have, though for a short time only, been exposed to the risks insured against, and within the conditions of the policy, in such manner that the insurers might have been liable for a loss, no return of premium for Insurance of the property so at risk can be claimed. 2d *Phillips*, §1819.

Lord *Mansfield*, C. J., in *Tyrie v. Fletcher*, 2 Cowp., 666, states the law as follows: "There are two general rules established, applicable to this question; the first is, that where the risk has not been run, whether its not having been run were owing to the fault, pleasure or will of the insured, or to any other cause, the premium shall be returned; because a policy of Insurance is a contract

of indemnity. The underwriters receive a premium for running the risk of indemnifying the insured, and whatever cause it is owing to, if he do not run the risk, the consideration, for which the premium or money was put into his hands, fails, and, therefore, he ought to return it. 2d, Another rule is, that if the risk of the contract of indemnity have once commenced, there shall be no apportionment or return of premium afterwards.

Upon these two principles the solution of every question relating to return of premium, depends. See *Graves v. Mar. Ins. Co.*, 2 Caines, 339; *Forbes v. Church*, 3 Johns, 159; *Lawrence v. Ocean Ins. Co.*, 11 Johns, 262; *Marine Ins. Co. of Alex. v. Tucker*, 3 Cranch, 385; *Hendricks v. Commercial Ins. Co.*, 8 Johns, 1; *Steinback v. Col. Ins. Co.*, 2 Caines, 129; *Taylor v. Lowell*, 3 Mass., 343; *Merchants' Ins. Co. v. Clapp*, 11 Pick. 57.

It may, therefore, be clearly stated, that this rule gives to the insured the power of avoiding the contract, in whole or in part, after it is made; because the contract is substantially a promise by the insurers to indemnify the insured against a certain risk if that risk be incurred, and a promise of the insured in return to pay the premium to the insurers if their promises of indemnity attach. If no part of the risk attach, either because no part of the goods is shipped, or because no part of the voyage takes place, or because the Insurance was predicated on a fact about which the parties were mistaken, or because the insured had no interest, or because the vessel was unseaworthy and consequently the risk never attached, the whole premium is returnable.

Many Insurance companies, by a clause in their policies, retain one-half of one per cent on the premium returnable ; but in some cases, other terms are agreed upon for the return of premium.

If the policy be on time at an entire premium, no part of the premium is returnable after the policy has attached. In *Loraine v. Tomlinson*, 2 Doug., 585 ; a ship being insured at an entire premium for twelve months, the risk terminated at the end of two months, and the assured thereupon claimed a return of a part of the premium for the subsequent time ; but it was held that he was not entitled to it.

The shortness of the duration of the risk, has no bearing on the question of return of premium ; the moment the risk commences the whole premium becomes the absolute property of the underwriters. It is, in fact, quite impossible to apportion the premium with reference to the duration of the risk, which may be greater in the first hour than in the whole of the rest of the voyage ; in all cases, therefore, where the risk under the policy is entire, if the ship once get under weigh and sail on the voyage insured, the premium is acquired, though she may return the next instant and wholly abandon the voyage.

So where the Insurance is "at and from," and the risk under the policy entire, there can be no return of premium, though the ship may be lost while *at* the port waiting to take in a cargo.

The general rule seems to be that where no usage is proved to the contrary, an entire premium cannot be divided and apportioned unless the risks be divided in the

policy in such a manner as to show that the parties had distinct risks in contemplation.

A return on account of a less amount being put at risk than is insured, is called a return of premium for short interest. But an action for the return of premium on account of short interest will not lie if the interest of the party to the extent insured were covered at any time during the voyage.

If on an open policy the underwriters agree to insure all shipments on account of the insured made between certain ports within a fixed time, at a certain rate for each shipment according to its value, the insured is bound to pay the premium for every shipment. *New York Fire M. Ins. Co. v. Roberts*, 4 Duer, 141. But if the policy were intended to cover such shipments only as the insured might elect to have indorsed, he would be liable for the premium for no others. In other words, the underwriters are entitled to the premiums only if they would have been liable if the goods had been lost. *E. Carver Co. v. Manufacturers' Ins. Co.*, 6 Gray, 214.

With regard to return of premium for short interest, over insurance and double insurance, the principle on which the cases depend is simply this: that if the underwriter could at any time, and under any conceivable circumstances, have been called on to pay the whole sum on which he has received premium, in such case the whole premium is earned, and there shall be no return; if, on the other hand, he could never, in any event, have thus been called on to pay the whole, but a part only of the amount of his subscription (say a half or a fourth), he ought not to retain a larger proportion

than one half or one fourth of the premium, and must return the residue. *Holmes v. United Ins. Co.*, 2 John Cas., 329; *Pollock v. Donaldson*, 3 Dallas, 510; *Foster v. U. S. Ins. Co.*, 11 Pick., 85; *Finney v. Warren Ins. Co.*, 1 Metcalf, 16.

American policies generally contain a provision, that "if the assured have made any prior insurance upon the property, the insurers shall be answerable for so much only as the amount of such prior insurance may be deficient towards covering the property, and shall return the premium upon as much of the sum insured as they shall be exonerated from, by such prior insurance."

This clause is, of course, not applicable to simultaneous policies, since they are not prior and subsequent in respect to each other.

WARRANTIES.

A warranty is a stipulation or agreement, on the part of the insured, in nature of a condition precedent. There are stipulations frequently introduced into policies, which do not fall under this definition; but are rather exceptions to the general terms of the contract, by which the underwriter is to be exempted from certain risks, either wholly or in part. Of this description are the "warranty to be free of particular averages," in the common memorandum, and the "warranty to be free from capture in port;" These are *exemptions* rather than *conditions precedent*.

Warranties are either *express* or *implied*. An express

warranty is a particular stipulation, introduced into the written contract, by the agreement of the parties ; as, that the thing insured is neutral property, that the ship shall sail by a given day, that she shall depart with convoy &c. An implied warranty is that which necessarily results from the nature of the contract ; as that the ship shall be sea-worthy when she sails, that she shall be navigated with reasonable skill and care, that the ship shall not deviate from the usual course of the voyage &c.

Express Warranties.

An express warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfilment of which, the validity of the entire contract depends. 3 Kent, 5th ed. 288.

A non-compliance with a warranty, though it occasion no damage, and do not change or increase the risk, has the effect of discharging the underwriter from liability.

The warranties that most frequently occur in policies of Insurance, are, 1st, Warranty of Ownership ; 2nd, Warranty of Neutrality ; 3rd, Warranty of the time of sailing ; 4th, Warranty to sail with convoy ; 5th, Particular warranties and stipulations ;—They will be found treated at length in all works on Insurance ; here, we have space to consider them but briefly :

1st, Warranty of Ownership.

The insurers have the right of personal selection ; they may be willing to insure for one person and not for

another ; and therefore the usual clause, that the policy shall be void if assigned without their consent, is certainly valid, whatever may be the right to transfer in the absence of this clause.

2nd, *Warranty of Neutrality.*

A warranty that the ship or goods are neutral or neutral property, is an engagement on the part of the assured, that it is owned by persons resident in a country at peace when the risk begins, and who have the commercial character of subjects of such country, and that it shall be accompanied with such documents, and shall be managed and conducted by the assured and their agents so, as to be entitled, as far as depends on them, to all the protection and privileges of property belonging to the subject of such country. Phillips on Insurance, 783.

Under this warranty the cargo must be accompanied by proof of its national character ; the invoices, bills of lading, the letters relating to the goods, and the certificates of consuls or other officers, must all be consistent with, and confirm, the warranty. *Griffith v. Ins. Co. of N. America*, 5 Binn., 464.

As the warranty of neutrality of property requires actual neutral ownership, and proper proof of this, so it requires such trade, conduct and course of transaction as shall be in conformity and adaptation to this warranty. And, therefore, if the neutral interests or property be undistinguishably mixed up with belligerent interests or property, they become liable themselves to all the incidents and effects of a belligerent character. 2d Parsons, 116.

The law of nations in respect to neutrality is controlled to a considerable extent by treaties between different countries, the terms and provisions of which must be strictly complied with.

As to what articles are contraband, and what particular acts, trade &c., are held by belligerents to be unlawful. See *Chitty on the Law of Nations*, and *Wheaton on Captures*.

3d, *Warranty of the time of sailing.*

Probably one of the most important of all express warranties, is that which alleges either that the ship has sailed, or that she will sail on, before or after a given day.

A vessel *has sailed* the moment she weighs anchor or casts off her fastenings and gets under weigh, in complete preparation for the voyage, with the purpose of proceeding to sea, without further delay at the port of departure.

The ship must be actually moving, with the intention of prosecuting her voyage.

If the ship have broken ground on her sea voyage, and once got fairly under sail for her place of destination, though she may have gone a little way only, and she afterwards put back from stress of weather, or be in any way afterwards detained, yet, as there will have been a beginning to sail on the voyage insured, the warranty will be held to have been complied with. *Boven v. Hope Ins. Co.*, 20 Pick., 275; *Union Ins. Co. v. Tyson*, 3 Hill, 118.

4th, Warranty to sail with convoy.

A warranty to sail or depart with convoy, is understood to mean that the ship shall sail with the convoy appointed by the government for the voyage; and, if convoy be usually furnished for a part of the voyage only, it is no breach of the warranty to perform the remainder without any convoy. It is generally necessary to obtain sailing orders, because without them the master cannot answer signals, or know the place of rendezvous in case of a storm, and he does not in effect put himself under the protection of the convoy, and therefore the underwriters are not benefited.

5th, Particular Warranties and Stipulations.

A great variety of warranties and stipulations is occasionally introduced into policies of insurance, which not unfrequently results in litigation. It is impossible to enumerate these several stipulations, or to lay down any definite rules regarding them. It may be observed, however, that no cause, however sufficient; no motive, however good; no necessity, however irresistible, will excuse non-compliance with an express warranty; if it be not in fact complied with, though for the best reasons, the policy is void.

A warranty, like every other part of the contract, is to be construed, as to the terms it employs, according to the understanding of merchants, and does not bind the insured beyond the commercial import of the words.

IMPLIED WARRANTIES.

An implied warranty, condition or stipulation, is an

agreement not expressed in the policy, but presumed from the fact of making insurance. The warranties implied in every policy of Insurance, are seaworthiness, proper documentation, and not to deviate.

Warranty of Seaworthiness.

There is in every policy an implied warranty that the ship is seaworthy when the policy attaches. This means, that the vessel is competent to resist the ordinary attacks of wind and weather, and is competently equipped and manned for the voyage, with a sufficient crew, and with sufficient means to sustain them, and with a captain of general good character and nautical skill.

We have already considered the subject of seaworthiness at some length, under the heads of Partial and Total Loss. We shall mention here only, that there is nothing in the law of Marine Insurance more important, with a view to both the benefit of commerce and the preservation of human life, than to enforce, as far as possible, a strict compliance with this warranty ; as otherwise the effect of insurance might be to render those who were protected from loss by the policy exceedingly careless about the condition of the ship, and the consequent safety of the crew. The Courts, accordingly, have held that the seaworthiness of the ship for the voyage, when she sails, is a condition precedent to the underwriter's liability for any loss incurred in the course of the voyage.

Deviation.

Deviation means a voluntary departure without necessity, or any reasonable cause, from the regular and usual course of the specific voyage insured; or it is a varying of the voyage; and it matters not whether the risk be increased or diminished thereby, the effect in either case being the same—to terminate the responsibility of the underwriters.

It is not necessary to prove that the risk has been enhanced by the delay or deviation. The underwriters undertake to indemnify the assured only upon the implied condition that the risk shall remain precisely the same as it appears to be on the face of the policy. Insurance is a contract whereby, for a stipulated premium the underwriters agree to indemnify the assured against certain perils or risks; and that the contract may be fair between the parties, the premium must be adequate, or in due proportion to the risks. But this would be impossible unless the risks can be to a certain extent known beforehand, and therefore estimated. If the Insurance be upon a voyage, it must be distinctly stated; and its course and termini being known, the underwriters may then judge of the risks to be encountered on that voyage. It is, therefore, always presumed that the voyage is to be pursued in the most direct and safe course, and the adventure conducted, in general, in the most expeditious manner as far as is consistent with safety; and if there be any departure from such course or mode of conducting the adventure, whereby the risks insured against are varied or increased, the assured must

justify such departure, by showing either a usage in that respect, or a reasonable necessity.

We have elsewhere shown what will amount to a deviation so as to release the underwriters, it is therefore unnecessary to enter fully into it again in this chapter. See Liability of Underwriters in chapter on Partial Loss

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